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TOBACCO ADVERTISING AND THE FIRST AMENDMENT: A STRANGE CONSTITUTIONAL DOCTRINE^{*1} INDEED

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I. INTRODUCTION

The First Amendment poses a difficult practical problem: It is quite short and does not explain what counts as speech, what counts as freedom, or what counts as abridging. To fill the chasm between the broad rule and its application to specific cases, a great deal of thinking has to be done.²

On August 7, 1995, President Clinton announced a sweeping Food and Drug Administration (FDA) proposal designed to reduce roughly by half children's and adolescents' use of tobacco products.³ If adopted, the rules would dramatically alter the labeling, sale, distribution, and advertising of cigarettes and smokeless tobacco in this country.⁴ A suit filed by the tobacco industry in federal court in North Carolina makes numerous jurisdictional, statutory,

^{1*} This title derives from a famous exchange between Chief Justice Rehnquist and Justice Brennan in their respective opinions in *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*, 478 U.S. 328 (1986). Writing for the majority, Chief Justice Rehnquist argued that it would... surely be a strange constitutional doctrine which would concede to the legislature the authority to totally ban [casino gambling], but deny to the legislature the authority to forbid the stimulation of demand for [such gambling] through advertising. *Id.* at 346. Justice Brennan's replied in his stinging dissent that the constitutional doctrine' which bans Puerto Rico from banning advertisements concerning lawful casino gambling is not so strange a restraint— it is called the First Amendment. *Id.* at 355 n. 4 (Brennan, J., dissenting). The vitality of Rehnquist's greater power includes the lesser reasoning is discussed *infra* part III.B.2.b.

²Alex Kozinski and Stuart Banner, *The Anti-History and Pre-History of Commercial Speech*, 71 TEx. L. REv. 747, 748 (1993).

³FDA Proposal, 60 Fed. Reg. 41,314 (proposed Aug. 11, 1995)(to be codified at 21 C.F.R. Pt. 897). The FDA, adopting an objective of the 1990 Department of Health and Human Services Healthy People 2000 report, intends to reduce by roughly half the number of young Americans who smoke within seven years of the date of publication of the final rule. *Id.*

⁴*Id.* at 41,321.

and constitutional claims that threaten to render the proposal dead on arrival.⁵ This paper examines the First Amendment issues created by the FDA's unprecedented proposal to restrict tobacco advertising aimed at children and to compel manufacturers to establish and maintain a public education campaign.

The FDA's proposed advertising restrictions, described in greater detail *infra* part II, would ban outdoor advertising for tobacco products within a specified distance of schools and playgrounds; require print advertising to be in black and white text-only format except in publications with a sufficiently high adult readership; ban the sale or distribution of promotional items containing the name or logo of branded non-tobacco items; and prohibit brand sponsorship of events such as concerts and auto races. The FDA also proposes to require manufacturers to establish and maintain a national public education campaign aimed at children and adolescents to counter the pervasive imagery and reduce the appeal created by decades of pro-tobacco messages.⁶

The FDA argues that these regulations will significantly decrease the amount of positive imagery that makes [cigarettes and smokeless tobacco products] so appealing to young people,⁷ and thus will significantly decrease the number of young people who begin smoking. According to existing evidence, however, it is uncertain whether advertising restrictions actually decrease tobacco use among young people—indeed, as discussed *infra* part IV, no consen-

⁵Six of the nation's largest cigarette and smokeless tobacco product manufacturers sought declaratory and injunctive relief against the FDA and its commissioner, David A. Kessler, M.D., in federal court in North Carolina. One company, the Liggett Group, has since announced its withdrawal from the litigation as part of a settlement of an unrelated class action suit. See Bamaby J. Feder, A United Front By Big Tobacco Starts to Crack, N.Y. TIMES, March 14, 1996, at A1.

⁶FDA Proposal, 60 Fed. Reg. at 41,314.

⁷Id.

sus emerges from statistical and anecdotal data as to whether such restrictions would have any effect at all. This uncertainty results in the two questions that are the subject of this paper: (1) do the FDA's proposed rules survive First Amendment scrutiny? and (2) should they?

The FDA addresses these questions in the commentary that accompanies the proposed rules, but its legal analysis is wholly unsatisfactory. The constitutionality of most— but not all— of these proposed rules hinges on the application of the commercial speech doctrine.⁸ Commercial speech jurisprudence has been among the most unsettled and unpredictable areas of First Amendment law since the seminal case of *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*⁹ The Supreme Court's efforts to define the category of commercial speech, to scrutinize government attempts to regulate it, and to justify its decisions by reference to First Amendment theory and values have been inconsistent and, at times, irreconcilable. The FDA invoked one strain of this jurisprudence to conclude that its proposed rules could easily withstand a First Amendment challenge, but failed even to mention, much less respond to, the strong arguments, based on both theory and recent precedent, that the tobacco lobby¹⁰ might make in response.

This paper attempts a much more thorough analysis of the First Amendment issues raised by the proposed rules. Such analysis reveals fatal

⁸Commercial speech is one of the so-called low-value categories of speech not protected to the full extent of the First Amendment. See Jeffrey M. Shaman, *The Theory of Low-Value Speech*, 48 SMU L. REV. 297, 317 (1995).

⁹ 376 U.S. 61 (1964).

¹⁰For the sake of uniformity and simplicity, I will refer to the parties that oppose the FDA's proposed regulations collectively as the tobacco lobby, although some groups may have no economic stake in the health of the tobacco industry and have other reasons for opposing the

constitutional defects with at least one aspect of the proposal, concludes that the remaining restrictions present much closer constitutional questions than the FDA acknowledges, and argues that the proposal as a whole is difficult to reconcile with a coherent theory of the First Amendment. Towards these ends, I take the following approach. Part II describes the youth tobacco use crisis in this country and presents in greater detail the FDA's proposed rules. Part III summarizes the relevant commercial speech principles, including the definition of commercial speech, the First Amendment values served by protecting or not protecting it to the full extent of the Constitution, and the various tests the Supreme Court has used to scrutinize government attempts to regulate such speech. Part IV applies these principles to the FDA proposal, draws conclusions as to its constitutionality, and argues that the proposal contradicts fundamental First Amendment principles. Part V offers some concluding observations and suggests an alternative approach to restricting speech.

II. YOUTH, TOBACCO, AND THE FDA PROPOSAL

A. Youth Tobacco Use in the United States

My grandfather smoked his first cigarette when he was nine years old. According to my grandmother, he and his friends would sneak into the alleyways behind their southwest Philadelphia homes and smoke the cigarettes that they had pilfered from their fathers and bought with the money made shining shoes. He continued to smoke for the next fifty years until, remarkably, he was able to quit in the late 1960's. Nonetheless, my grandfather contracted lung cancer and died in 1980 of a heart condition that was aggravated by lung

removal surgery made necessary by the cancer. What caused him to begin smoking will forever remain a mystery. My grandmother blames the bad kids that he fell in with in the neighborhood— as she says, they smoked, so he started too. What is not a mystery is that his story is typical of millions of stories since.

The number of American young people who use tobacco products is staggering. Currently, more than three million American adolescents smoke cigarettes and an additional one million adolescent males use smokeless tobacco.¹¹ The vast majority of the fifty million American smokers began smoking as children or adolescents.¹² Studies suggest that the younger one begins to smoke, the more likely one is to become a heavy smoker,¹³ while those that have not begun smoking by age eighteen are unlikely ever to do so.¹⁴

Widespread tobacco use by young people has taken a disastrous toll on the nation's health. Researchers estimate that 400,000 people die each year from smoking related illnesses¹⁵ and numerous studies have established causal

¹¹DEPARTMENT OF HEALTH AND HUMAN SERVICES, Preventing Tobacco Use Among Young People: A Report of the Surgeon General, Atlanta, Georgia: DHHS, PHS, CDC, NCCDPHP, OSH, 1994, at 5, *reprinted in* FDA Proposal, 60 Fed. Reg. at 41,314 (hereinafter cited as 1994 SGR). According to a 1994 Institute of Medicine Report, approximately 3000 young people per day become regular smokers. INSTITUTE OF MEDICINE, Growing Up Tobacco Free, 1994, at 8, *reprinted in* FDA Proposal at 60 Fed. Reg. at 41,314 (hereinafter JOM). A 1990 study estimated that adolescents consume 947 million packs of cigarettes and 26 million containers of smokeless tobacco and account for annual tobacco sales of \$1.26 billion. DiFranza, J.R. and J.B. Tye, Who Profits From Tobacco Sales to Children? JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION, vol. 263, No. 20, 1990, at 2784-2787, *reprinted in* FDA Proposal. 60 Fed. Reg. at 41,317.

¹²According to the Surgeon General's Report, eighty-two percent of adults who ever smoked had their first cigarette before age 18. 1994 SGR, *supra* note 10, at 65, *reprinted in* FDA Proposal, 60 Fed. Reg. at 41,314;

¹³E. Taioli and E.L. Wynder, Effect of the Age at Which Smoking Begins on Frequency of Smoking in Adulthood, THE NEW ENGLAND JOURNAL OF MEDICINE, vol. 325, No. 13, 1991, at 968-969, *reprinted in* FDA Proposal, 60 Fed. Reg. at 41,314; L.G. Escobedo, et al., Sports Participation, Age of Smoking Initiation, and the Risk of Smoking Among U.S. High School Students, JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION, vol. 269, No. 11, 1993, at 1391-1395, *reprinted in* FDA Proposal, 60 Fed. Reg. at 41,314.

¹⁴1994 SGR, *supra* note 10, at 5, 58, 65-67. *reprinted in* FDA Proposal, 60 Fed. Reg. at 41,314.

¹⁵J.M. McGinnis and W.H. Foege, Actual Causes of Death in the United States, JOURNAL

links between smoking and cancer, heart disease, and stroke.¹⁶ Studies show that a person whose tobacco use begins in adolescence and continues over his or her lifetime faces a fifty percent risk of dying prematurely as a direct result.¹⁷ Further, the earlier a person's habit begins, the greater the risk of developing smoking-related diseases.¹⁸ Smokeless tobacco's links to various forms of oral cancer have been well-documented,¹⁹ and, as with cigarettes, the longer the exposure to smokeless tobacco products, the greater the risk of contracting cancer.²⁰

Perhaps most alarming is that adolescent tobacco use is on the rise. Even while smoking rates have declined for most segments of the American adult population in the past few decades, the number of young smokers is increasing.²¹ According to studies cited by the FDA,

Between 1991 and 1994, the prevalence of smoking by eighth graders increased 30 percent, from 14.3 percent to 18.6 percent. Among 10th grade

OF THE AMERICAN MEDICAL ASSOCIATION, vol. 270, No. 18. 1993, at 2207-2212, *reprinted in* FDA Proposal, 60 Fed. Reg. at 41,318. As Dr. David Kessler, Commissioner of the FDA, recently told an audience at Georgetown University, smoking kills more people each year in the United States than AIDS, highway accidents, alcohol, homicides, illegal drugs, suicide, and fires combined. FEDERAL NEWS SERVICE, August 16, 1995.

¹⁶See FDA Proposal, 60 Fed. Reg. at 41,318 and un. 34 - 39.

¹⁷Peto, et. al., Mortality From Smoking in Developing Countries, 1950-2000. Indirect Estimates from National Vital Statistics, Oxford, England: Oxford University Press, 1994, at AIO, *reprinted in* FDA Proposal, 60 Fed. Reg. at 41,318.

¹⁸Taioli and Wynder, *supra* note 12, at 968-969. *reprinted in* FDA Proposal, 60 Fed. Reg. at 41.3 18; Escobedo, et al., *supra* note 12, at 1391-1395, *reprinted in* FDA Proposal, 60 Fed. Reg. at 41,318.

¹⁹1994 SGR, *supra* note 10, at 39, *reprinted in* FDA Proposal, 60 Fed. Reg. at 41,319.

²⁰Department of Health and Human Services, The Health Consequences of Using Smokeless Tobacco: A Report of the Advisory Committee to the Surgeon General. Bethesda, Md., DHHS, PHS, DHHS, PHS, NIH Publication No. 86-2874, 1986, 33-47, *reprinted in* FDA Proposal, 60 Fed. Reg. at 41,319.

²¹THE UNIVERsrrY OF MICHIGAN, NEWS AND INFORMATION SERVICE, July 20, 1995, Smoking rates climb among American teenagers, who find smoking increasingly socially acceptable and seriously underestimate the risks, Table 1, *reprinted in* FDA Proposal, 60 Fed. Reg. at 41,317. See also FDA Proposal, 60 Fed. Reg. at 41.315 and n. 17.

students, it increased from 20.8 percent to 25.4 percent and for 12th grade students, it rose from 28.3 percent to 31.2 percent. Between 1985 and 1994, smoking among college freshmen increased from 9 percent to 12.5 percent.²²

Another study, completed in 1995, found that smoking rates among 13- and 14-year-olds had increased thirty percent in the three previous years alone.²³

B. The Food and Drug Administration's Proposed Restrictions

It is against this backdrop of alarmingly high and steadily rising rates of tobacco use among young people, and the grave health consequences of such use, that the Food and Drug Administration proposed its rules. The proposal reflects a scientific judgment that nicotine addiction should be treated as a pediatric disease and the attendant policy judgment that the FDA's limited resources should be focused on tobacco use by children and adolescents.²⁴ Rather than banning tobacco products for the millions of Americans who are currently addicted to them, this regulation focuses on preventing future generations from developing an addiction to nicotine-containing tobacco products.

²⁵ Towards this end, the FDA conducted extensive research, consulted health officials in this country and throughout the world,²⁶ and developed a strategy whose two primary components are (1) restricting the sale and distribution of tobacco products to young people, and (2) reducing the appeal of such prod-

²²FDA Proposal, 60 Fed. Reg. at 41,315 (citations omitted).

²³The MacNeil/Lehrer NewsHour, August 10, 1995.

²⁴*Id.* at 41,314

²⁵*Id.*

²⁶The FDA credited numerous resources, including the World Health Organization, the Office of the Surgeon General, the Centers for Disease Control and Prevention, the National Cancer Institute, and the Institute of Medicine. *Id.* at 41,315.

ucts by restricting tobacco advertising and increasing public awareness of the dangers of tobacco use. This paper concerns the second category of regulations.

The FDA proposes that the following rules be included in new part 897 of Title 21 of the Code of Federal Regulations:

* Educational Programs Concerning Cigarettes and Smokeless Tobacco Products. Proposed 21 C.F.R. §897.29 would require each manufacturer to establish and maintain a national public educational program, including major reliance on television messages, to combat the effects of the pervasive and positive imagery that has for decades helped to foster a youth market for tobacco products.²⁷ This section would require each manufacturer to devote an amount of money to the corrective educational program proportionate to its share of the total advertising and promotional expenditures of the industry as a whole.²⁸ The rule would further require that the industry members to select from a variety of messages maintained by FDA... [which] would determine which messages are appropriate in consultation with [other government agencies].²⁹ Manufacturers would also have to report to the FDA on the effectiveness of the program.

*Outdoor advertising. Proposed 21 C.F.R. §897.30(b) would prohibit outdoor advertising of tobacco products from appearing outside of buildings within 1,000 feet of an elementary or secondary school or playground.³⁰

* Black and white, text-only (tombstone) advertising. Proposed

²⁷*id.* at 41,327.

²⁸*Id.* at 41,328.

²⁹*Id.* at 41,327-328.

³⁰*Id.* at 41,334.

21 C.F.R. §897.32(a-b) would require that permissible print advertising of tobacco products be in black and white, text-only form in all publications that do not have a primarily adult readership. A publication has a primarily adult readership if (a) [its] readers age 18 or older constitute 85 percent or more of [its] total readership, or (b) [it] is read by two million or fewer people under age 18, whichever method results in the lower number of young people.³¹

* Branded non-tobacco items and sponsorship Proposed 21 C.F.R. §897.34(a) would prohibit the sale or distribution of all non-tobacco items that are identified with a cigarette or smokeless tobacco product brand name or other identifying characteristic; §897.34(b) would prohibit all proof of purchase sales or gifts of non-tobacco items as well as all contests, lotteries, games of chance that are linked to the purchase of, or in consideration for the purchase of a tobacco product; and §897.34(c) would further prohibit a sponsored event from being identified with a cigarette or smokeless tobacco product brand name or any other brand identifying characteristic. Sponsorship would be permitted in corporate name only, and that corporate name must have been in existence on January 1, 1995.³²

The sweeping scope of these proposed rules is apparent from their description.

While tobacco advertising is already subject to some legal restric-

³¹ *Id.* at 41,335.

³² *Id.* at 41,336.

tions³³ and is further limited by voluntary industry codes,³⁴ the proposed rules go so far beyond existing restrictions that the tobacco lobby argues that they would be tantamount to a ban of all tobacco advertising and promotion.³⁵ As draconian as these measures appear at first glance, they may yet be consistent with the guarantees of the First Amendment. The next section summarizes the First Amendment principles and doctrine that govern the constitutionality of the FDA's proposed rules.

III. COMMERCIAL SPEECH: DEFINITION, THEORY, AND DOCTRINE

In 1942, the United States Supreme Court held unanimously that the Constitution imposes no... restraint on government as respects purely commercial advertising.³⁶ The Court offered no further explanation of its decision, and apparently considered it quite an easy case.³⁷ After years of criticism of the casual and almost offhand nature of this decision,³⁸ and considerable erosion

³³For example, federal laws forbidding television and radio advertising of tobacco products were upheld in *Capital Broadcasting Co. v. Mitchell*, 333 F.Supp. 582 (D.D.C. 1971), *affid per curiam*, 405 U.S. 1000 (1972).

³⁴The Cigarette Advertising and Promotion Code (CAPC) includes guidelines intended to ensure that advertising be placed in adult-oriented media and appeal only to adults, and that minors not participate in promotional offers and contests. Both the CAPC and the Outdoor Advertising Association of America's Code of Advertising Practices call for a distance of 500 feet from established schools and playgrounds for the placement of tobacco billboards. See *Leo Burnett, Inc., Comments from the Leo Burnett Company, Inc. To the Food and Drug Administration on Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco Products to Protect Children and Adolescents*, Docket No. 95N-0253, December 1995, 4 (hereinafter *Leo Burnett*).

³⁵*Id.* at 46.

³⁶*Valentine v. Chrestensen*, 316 U.S. 52, 54 (1952) (upholding a New York ban on distributing commercial handbills).

³⁷Kozinski and Banner, *supra* note 1, at 757, claim that *Valentine* was one of the easiest cases the Court ever decided. The Court decided the case four days after oral argument and announced its opinion nine days later— a time frame not unheard of in those days, but about as fast as any case was ever decided. *Id.* The case was not one any of the Justices found necessary to dwell upon. *Id.*

³⁸*Cammarano v. United States*, 358 U.S. 498, 514 (1959) (Douglas, J., concurring).

of the holding,³⁹ the Supreme Court reversed itself in the landmark 1976 case of *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*⁴⁰ In *Virginia Board*, the Court overturned a state prohibition of commercial drug price advertising, declaring unmistakably that commercial speech is protected by the First Amendment,⁴¹ though not to its full extent.⁴² In dicta, the Court explained that some forms of commercial speech regulation are surely permissible, but left for another day a description of these forms. Courts, lawyers, commentators, and business people have wrestled with this question ever since. Professor Schauer noted in 1988 that almost all of the foundational questions about first amendment protection for commercial speech remain on the table for consideration and reconsideration.⁴³ While this may be less true in 1996 than it was in 1988, important questions that directly bear on the constitutionality of the FDA's proposed restrictions remain unresolved today.

A.. What is commercial speech?

The first appearance of the phrase commercial speech in a judicial opinion occurred in a 1971 decision of the D.C. Circuit.⁴⁴ The Supreme Court

³⁹See, e.g., *Pittsburgh Press Company v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973) (upholding an ordinance prohibiting newspapers from carrying sex designated advertising columns); *Bigelow v. Virginia*, 421 U.S. 809, 817 (1975) (speech is not stripped of First Amendment protection merely because it appears in [commercial advertisements]). See also Steven M. Simpson, Note, *The Commercial Speech Doctrine: An Analysis of the Consequences of Basing First Amendment Protections on the 'Public Interest'*, 39 N.Y.L. SCH. L. REV. 575 (1994).

⁴⁰425 U.S. 748 (1976).

⁴¹The First Amendment of the United States Constitution provides that Congress shall make no law... abridging the freedom of speech, or of the press. U.S. CONST. amend. I.

⁴²425 U.S. at 773.

⁴³Frederick Schauer, *Commercial Speech and the Architecture of the First Amendment*, 56 U. CtN. L. REV. 1181, 1182(1988).

⁴⁴Kozinski and Banner, *supra* note 1, at 756. Judge Skelly Wright noted that [c]ommercial advertising—indeed, any sort of commercial speech— is less fully protected than other speech, because it generally does not communicate ideas and thus is not directly related to the central purpose of the First Amendment. *Business Executives' Move for Vietnam Peace v. FCC*, 450 F.2d 642, 658 n.38 (D.C. Cir. 1971), *rev'd sub nom.*, *CBS, inc. v. Democratic Nat'l*

adopted the term two years later in *Pittsburgh Press*—describing *Valentine* as the origin of the commercial-speech doctrine⁴⁵—and has used the term ever since.⁴⁶ The Court has been less consistent, however, in how it has defined what speech counts as commercial for purposes of the First Amendment.⁴⁷ A clear definition has been elusive because a coherent justification for distinguishing commercial from non-commercial speech has never been made entirely clear, as will be demonstrated in the following section. Because the reason for a distinction determines its bounds, the question becomes how to define the latter without the former.

The Court has most frequently defined commercial speech as speech that does no more than propose a commercial transaction,⁴⁸ but has dropped the does no more in recent cases.⁴⁹ Examples of speech categorized as commercial under this definition include print and broadcast advertising,⁵⁰ face-to-face and direct mail solicitation,⁵¹ and tupperware parties.⁵² In *Cincinnati v. Dis-*

Committee, 412 U.S. 94 (1973).

⁴⁵*Pittsburgh Press*, 413 U.S. at 384.

⁴⁶*Kozinski and Banner*, *supra* note 1. at 756.

⁴⁷Numerous commentators have noted the Court's failure to draw a principled distinction between commercial and non-commercial speech. *See, e.g.*, Jeffrey M. Shaman, *supra* note 7, at 317; R. George Wright, *Freedom and Culture: Why We Should Not Buy Commercial Speech*, 72 *DENY. U. L. REV.* 137, 157-58 (1994); David F. McGowan, *Comment, A Critical Analysis of Commercial Speech*, 78 *CALIF. L. REV.* 359, 383-85 (1990); Schauer, *supra* note 42, at 1185 n. 17. Even the Supreme Court itself has acknowledged that the precise bounds of the category of expression that may be termed commercial speech are uncertain. *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 636 (1985).

⁴⁸*See, e.g.*, *Posadas*, 478 U.S. at 340; *Virginia Board*, 425 U.S. at 762.

⁴⁹*Rubin v. Coors Brewing Co.*, 115 S.Ct. 1585, 1589 (1995) (noting that litigants agreed that alcohol beverage advertising is commercial speech); *United States v. Edge Broadcasting*, 113 S.Ct. 2696, 2703 (1993) (holding that lottery advertising is commercial speech); *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 473 (1989) (holding that tupperware parties at issue were commercial speech).

⁵⁰*See, e.g.*, *Posadas*, 478 U.S. at 340 (casino gambling advertising); *Virginia Board*, 425 U.S. at 762 (drug price advertising).

⁵¹*Florida Bar v. Went For It, Inc.*, 115 S.Ct. 2371 (1995) (direct mail solicitation by lawyers); *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (in person solicitation by lawyers).

⁵²*Fox*, 492 U.S. at 473.

covery Network, Inc., the Court described these forms of speech as core commercial speech, but implied that other forms of speech may nonetheless qualify for the lower level of protection described *infra* part III.C.⁵³ *Discovery Network* concerned an ordinance that regulated the distribution of free magazines, published nine times per year, containing advertisements for educational, recreational, and social programs in the area, but also including some information about current events of general interest.⁵⁴ The Court noted that many of these publications could not be categorized as core commercial speech, but assumed for the purposes of that decision that they should all be treated as such.⁵⁵

The Supreme Court acknowledges that the precise bounds of the category of expression that may be termed commercial speech are uncertain,⁵⁶ and has provided relatively few clues as to how the outer margins of the category might be identified. The Court offered a potentially expansive definition in the critical 1980 decision of *Central Hudson Gas and Electric Corp. v. Public Service Commission*⁵⁷—*expression* related solely to the economic interests of the speaker and its audience⁵⁸—but has never adopted it.⁵⁹ Three years later, the Court faced the issue of whether informational pamphlets discussing the desirability of prophylactics in general or [respondent’s] products in particular

⁵³Cincinnati v. Discovery Network, Inc., 113 S.Ct. 1505, 1513 (1993).

⁵⁴*Id.* at 1508.

⁵⁵*Id.* at 1514.

⁵⁶*Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 636 (1985).

⁵⁷447 U.S. 557 (1980)(categorizing advertising by utility companies promoting electricity use as commercial speech).

⁵⁸*Id.* at 561.

⁵⁹*See* *Discovery Network*, 113 S.Ct. at 1513 (discussing the *Central Hudson* definition but declining to use it).

should be categorized as commercial speech.⁶⁰ The Court considered three factors— whether (1) the speech in question was an advertisement, (2) mentioned a specific product by name, and (3) the speaker had an economic motivation for speaking.⁶¹ The Court held that the combination of all three factors in the case supported the conclusion that the expression was commercial, but was careful to note that the mere presence of any one factor does not compel the conclusion that speech is commercial.⁶²

Whether a court regards speech as either commercial or non-commercial is not merely word-play. The characterization dictates whether a court applies intermediate scrutiny to a government regulation challenged in a particular case, or subjects the law to far more searching review. Indeed, the difference can be outcome determinative. Thus, the constitutionality of the FDA’s proposed restrictions will hinge in large part on how the regulated speech is defined.

The FDA proposal would regulate some expression clearly included in the core commercial speech described in *Discovery Network*, but would also extend to speech at the margins of the category. The tobacco and advertising industries will most likely have to concede that the proposed outdoor advertising and black and white, text-only restrictions regulate commercial speech. The Supreme Court has squarely held that advertising pure and simple falls within the category of commercial speech.⁶³ The proposed bans on branded sponsor-

⁶⁰ Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 66-67 (1983)

⁶¹ *Id.* at 66-67.

⁶² *Id.* at 66. Speech is *not* commercial merely because money is spent to project it; because it is in a form sold for profit; because it solicits money; or, because it regards a commercial subject. Alex Kozinshi and Stuart Banner, Who’s Afraid of Commercial Speech?, 76 VA. L. REv. 627, 638 (1990)). See also Virginia Board, 425 U.S. at 761; Cincinnati v. Discovery Network, 113 S.Ct. 1505, 1512 (1993).

⁶³ *Zauderer*, 471 U.S. at 636.

ship and promotional items may present slightly closer questions, however, and the industry-funded anti-smoking campaign pushes the very outer limits of the category, if not beyond.⁶⁴ These regulations implicate both the definitional ambiguity and the underlying uncertainty as to the First Amendment values that justify the commercial! non-commercial distinction in the first place.

B. Why should the First Amendment protect commercial speech differently than it protects non-commercial speech?

1. Theories of the First Amendment

Although the language of the First Amendment suggests no distinction between different categories of speech, the Court has never adopted the absolutist position advocated by Justice Hugo Black.⁶⁵ Rather, the Court has taken the view that not all speech is of equal First Amendment importance⁶⁶—that, because certain types of speech have less value than others, they are not entitled to the full protection of the First Amendment.⁶⁷ Such line-drawing presupposes an overarching theory of the First Amendment that renders the categories of speech inconsistent with these values readily identifiable. Yet no one theory has ever been espoused by the court, due largely to the fact that [t]he framers seem to have had no coherent theory of free speech and appear not to

⁶⁴*See, e.g.*, *Discovery Network*, 113 S.Ct. at 1512 ('[T]he speech whose content deprives it of protection cannot simply be speech on a commercial subject. No one would contend that [a] pharmacist may be prevented from being heard on the subject of whether, in general, pharmaceutical prices should be regulated, or their advertisement forbidden.')(quoting *Virginia Board*, 425 U.S. at 761-62 (1976)).

⁶⁵*Smith v. California*, 361 U.S. 147, 157 (1959) (Black, J., concurring) (I read 'no law... abridging' to mean no law abridging.)

⁶⁶*Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 (1985).

⁶⁷*See generally* Larry Alexander, *Low Value Speech*, 83 Nw. U. L. Rev. 547 (1989); Shaman, *supra* note 7. Other categories of low value speech include obscenity, libel, and fighting words.

have been overly concerned with the subject.⁶⁸ Instead, three major theories of the First Amendment have emerged over time, each achieving some degree of recognition on the Court, each useful to some degree as a guiding principle for when to protect speech and when not to.

The oldest justification⁶⁹ for free speech is that it is the essential instrument for the discovery of truth in the marketplace of ideas.⁷⁰ The argument begins with the premise, as described by noted First Amendment scholar Thomas Emerson, that the soundest and most rational judgment is arrived at by considering all facts and arguments which can be put forth in behalf of or against any proposition.... In individual who seeks knowledge and truth must hear all sides of the question, especially as presented by those who feel strongly and argue militantly for a different view.⁷¹

Under this theory, the First Amendment prohibits government attempts to suppress information that contributes to the search for truth, no matter how certainly true an accepted position may seem to be,⁷² no matter how unaccepted the contrary position.⁷³

[S]uppression of information, discussion, or the clash of opinion

⁶⁸Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. J. 1, 22 (1971).

⁶⁹John H. Garvey and Frederick Schauer, eds., *THE FIRST AMENDMENT: A READER* 58 (1992). *See* John Milton, *AREOPAGITICA* (1644)(let [Truth] and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?)

⁷⁰This now-familiar phrase was coined by Justice Oliver Wendell Holmes in his famous dissenting opinion in *Abrams v. United States*, 250 U.S. 616, 630 (1919)(the best test of truth is the power of the thought to get itself accepted in the competition of the market).

⁷¹Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 881 (1963).

⁷²*Id.*

⁷³John Stuart Mill, *ON LIBERTY* (1859)(If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind.)

prevents one from reaching the most rational judgment, blocks the generation of new ideas, and tends to perpetuate error... The only justification for suppressing an opinion is that those who seek to suppress it are infallible in their judgment of the truth. But no individual or group can be infallible, particularly in a constantly changing world.⁷⁴

Presumably, this theory implies no hierarchy of truths. Speech that leads to the discovery of any truth— regardless of how mundane or profound— is protected. Only speech that in no way contributes towards a search for any truth, that can not possibly be the basis of any rational opinion, would be left unprotected by this theory.

A second proposition, equally broad in scope, equally indebted to the Enlightenment for its origins, is that the First Amendment fundamentally serves the value of individual liberty.⁷⁵ Again, Professor Emerson explains this individual self-realization or self-fulfillment theory most lucidly. He writes that

[i]t derives from the widely accepted premise of Western thought that the proper end of man is the realization of his character and potentialities as a human being. Man is distinguished from other animals principally by the qualities of his mind.... It is through development of these powers that man finds his meaning and place in the world... From this it follows that every man— in the development of his own personality— has the right to form his own beliefs and opinions.... [, and to express them].... Hence suppression of belief, opinion,

⁷⁴Emerson, *supra* note 70, at 88 1-82.

⁷⁵*See generally* C. Edwin Baker, Scope of the First Amendment Freedom of Speech, 25 U.C.L.A. L. REv. 964(1978); Martin H. Redish. The Value of Free Speech, 130 U.PA. L.REv. 591 (1982).

and expression is an affront to the dignity of man, a negation of man's essential nature.⁷⁶

Thus, the First Amendment ensures that the government fulfills its purpose of promoting the welfare of the individual by prohibiting interferences with personal expression. Whether the expression is judged to promote good or evil, justice or injustice, equality or inequality⁷⁷ is irrelevant to its value under the First Amendment. So long as speech furthers individual self-realization, this theory holds it protected. This second theory is arguably broader in scope than the first, and, indeed, can be attacked on the grounds that it provides no limiting principle.

The third major theory holds a far narrower range of speech protected by the First Amendment. According to the argument espoused most prominently by Robert Bork⁷⁸ and Alexander Meiklejohn,⁷⁹ the First Amendment is an instrument to enlighten public decisionmaking in a democracy.⁸⁰ As Garvey and Schauer explain,

[t]he argument from democratic theory for a free speech principle rests on the assumption of popular sovereignty. If the people are going to exercise their sovereign power intelligently they need to be well-informed, and to debate before deciding.⁸¹

⁷⁶Emerson, *supra* note 70. at 879.

⁷⁷*Id.* at 880.

⁷⁸Bork, *supra* note 67, at 20 (Constitutional protection should be accorded only to speech that is explicitly political. There is no basis for judicial intervention to protect any other form of expression.).

⁷⁹*See* Alexander Meiklejohn. FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948); Alexander Meiklejohn, POLITICAL FREEDOM (1960).

⁸⁰Virginia Board, 425 U.S. at 765.

⁸¹Garvey and Schauer. *supra* note 68, at 100.

Meiklejohn argues that the First Amendment condemns with its absolute disapproval any suppression of ideas about the common good.⁸² Of course, how broadly one defines the common good determines the breadth of the First Amendment's protection under this theory, which can be understood as a limited form of the marketplace of ideas argument—one that values the political marketplace to the exclusion of all others. Democratic free speech theorists argue that theirs is the only possible reading true to originalist intent.⁸³

2. Commercial Speech and First Amendment Theory

The Court has held on numerous occasions that commercial speech must be distinguished from speech at the First Amendment's core.⁸⁴

Commercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, and is subject to modes of regulation that might be impermissible in the realm of noncommercial expression.⁸⁵

While the Court has clearly explained the theoretical underpinnings of including commercial speech within the First Amendment's sphere, its reasons for providing merely a limited degree of protection have been decidedly unconvincing. a. Why should the First Amendment protect commercial speech at all?

The Supreme Court justifies protection of commercial speech primarily by reference to the marketplace of ideas theory. In *Virginia Board*, the

⁸²Meiklejohn, POLITICAL FREEDOM, at 28.

⁸³See Kozinski and Banner. *supra* note 61. at 631.

⁸⁴Florida Bar v. Went For It, Inc., 115 S.Ct. 2371. 2375 (1995).

⁸⁵*Id.*

Court, per Justice Blackmun, held that bringing speech that does no more than propose a commercial transaction within the bounds of protected expression serves individual and societal interests in the free flow of commercial information.⁸⁶ A particular consumer has a strong interest in the information that will allow him or her to make informed, rational decisions about how to spend his or her money. Indeed, as the Court noted, an individual's interest in such information may be as keen, if not keener by far, than his interest in the day's most urgent political debate.⁸⁷ Moreover, individual consumers making informed decisions produce, in the aggregate, a net societal benefit. As the *Virginia Board* Court noted,

So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter public interest that those decisions, in the aggregate, be intelligent and well-informed. To this end, the free flow of commercial information is indispensable.⁸⁸

The Court reaffirmed this reasoning just last term in *Rubin*: the free flow of commercial information is 'indispensable to the proper allocation of resources in a free enterprise system' because it informs the numerous private decisions that drive the system.⁸⁹ b. Why should commercial speech not be

⁸⁶ *Virginia Board*. 425 U.S. at 763-64.

⁸⁷ *Id.* at 763; *Rubin v. Coors Brewing Co.*, 115 S.Ct. 1585, 1589 (1995)(quoting same).

⁸⁸ 425 U.S. at 765.

⁸⁹ 115 S.Ct. at 1589 (quoting *Virginia Board*). The Court has also contended that democratic free speech theory justifies according commercial speech a degree of First Amendment protection, albeit indirectly. As the Court stated in *Virginia Board*,

if [the free flow on commercial information] is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking

protected to the full extent of the First Amendment?

The Court's attempts to justify granting only a limited degree of protection to commercial speech begin with *Virginia Board's* famous footnote 24. In this note, the Court reasons that there are commonsense differences between speech that 'does no more than propose a commercial transaction,'... and other varieties..., that suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired.⁹⁰ The Court identifies two such differences— the greater objectivity and hardness of commercial speech⁹¹— and describes them as follows:

[First, t]he truth of commercial speech... may be more easily verifiable by its disseminator than, let us say, news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else. Also, commercial speech may be more durable than other kinds. Since advertising is the *Sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and foregone entirely.⁹²

This reasoning is highly questionable as an empirical matter, and utterly inadequate as constitutional analysis. First, as Kozinski and Banner persuasively argue, the verifiability analysis has no application to the image-based advertising that comprises much of today's commercial speech.⁹³ Take

in a democracy, we could not say that the free flow of information does not serve that goal.

425 U.S. at 765 (footnote omitted). This justification was clearly secondary to the marketplace reasoning, however, and has not been relied on since.

⁹⁰425 U.S. at 771 n. 24.

⁹¹*Id.*

⁹²*Id.*

⁹³Kozinski & Banner, *supra* note 61, at 635.

such slogans as Coke is it! or There's something about an Aqua Velva man or You and Betty Crocker can bake someone happy. It is unclear what claims are being made, much less how one would go about trying to verify them. Further, as Kozinski and Banner contend, other more objective and therefore verifiable forms of speech, such as scientific literature, do not suffer less protection as a result.⁹⁴ Last, one could argue just as plausibly that the more objective a category of speech, the less justification for government regulation, because such speech is more easily refuted by counterspeech.⁹⁵

The hardiness justification is equally unconvincing. According expression a degree of protection inversely proportional to the strength of the motive for expressing it has no basis in First Amendment theory—indeed, it runs directly counter to the notion of individual self-realization described above. Second, the Court provides no empirical support for the proposition that the profit motive is stronger than other motives for speaking.⁹⁶ What about speech motivated by romantic love? By religious fervor? Would similar reasoning support a lower standard for government attempts to regulate such forms of speech as these?

Remarkably, the Court has never questioned these justifications for a lesser degree of First Amendment protection. In recent years, however, the Court has generally moved away from referring to them—save for boilerplate references to the commonsense differences between commercial and non-

⁹⁴ *Id.*

⁹⁵ *Id.* at 636.

⁹⁶ *Id.* at 637.

commercial speech⁹⁷— and relied instead on two additional explanations of the subordinate position of commercial speech.

First, the Court has argued that '[t]o require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech.'⁹⁸ A response to this argument is difficult to formulate simply because the position has never been fully explained or substantiated. But the contention most likely starts with the premise that governments must have the ability to regulate certain forms of commercial speech—consumer fraud and securities regulation, for example— in the interests of a healthy economy.⁹⁹ Courts would have to uphold such regulations against First Amendment challenges. If the First Amendment were held to protect commercial and noncommercial speech equally, and the protection was weakened in order to permit legislatures to enact important economic laws, the protection granted other forms of speech would also suffer. Yet, as Kozinski and Banner once again argue, it is unclear why the basic content-neutral analysis that is applied to non-commercial speech would not permit legislatures from criminalizing consumer and securities fraud, for example, without diluting the freedom of speech generally.¹⁰⁰ So long as such laws serve an important government interest unrelated to the suppression of free expression, and the restriction is no

⁹⁷*See, e.g.*, *Discovery Network*, 113 5. Ct. at 1513; *Central Hudson*, 447 U.S. at 564 n. 6; *Metromedia*, 453 U.S. at 506.

⁹⁸*Florida Bar*, 115 S.Ct. at 2375 (quoting *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 456 (1978)). *See also* *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 480 (1989)(quoting same).

⁹⁹Kozinski and Banner, *supra* note 61, at 651.

¹⁰⁰*Id.*

greater than necessary, a court does not need intermediate scrutiny to uphold them against constitutional challenges.¹⁰¹ Kozinski and Banner argue that, at most, minor statutory modifications may be required, and they cite libel as an example of expression brought within the realm of the First Amendment without the dire consequences predicted.¹⁰²

We are left with the argument that lies at the heart of the distinction between commercial and non-commercial speech. The Court has argued that commercial speech is 'linked inextricably' with the commercial transaction it proposes... so that the State's interest in regulating this underlying transaction may give it a concomitant interest in the expression itself.¹⁰³ The argument is not one based on the speaker's motive— the Court has frequently noted that speech motivated purely by profit may nonetheless be entitled to full First Amendment protection¹⁰⁴— but on the content of the speech itself. The protection enjoyed by speech that does no more than propose a commercial transaction is mitigated by the state's power to regulate the transaction proposed. Carry this argument to its logical conclusion, of course, and one finds that state power to make certain products or services illegal would eliminate *all* First Amendment protection of the speech that proposes them.

This logical conclusion was, in fact, the law of the land very recently. In *Posadas de Puerto Rico Associates v. Tourism Company of Puerto*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Edenfield v. Fane*, 113 S.Ct. 1792, 1797 (1993)(quoting *Friedman v. Rogers*, 440 U.S. 1, 10 n. 9 (1979))(footnote omitted).

¹⁰⁴ *See, e.g., Virginia Board*, 425 U.S. at 761.

Rico,¹⁰⁵ the Court upheld a

Puerto Rican prohibition of casino gambling advertising aimed at the island's residents. The Court held that it is precisely because the government could have enacted a wholesale prohibition of the underlying conduct [casino gambling] that it is permissible for the government to take the less intrusive step of allowing the conduct, but reducing the demands through advertising.¹⁰⁶ The greater power includes the lesser¹⁰⁷ reasoning of *Posadas* inspired a torrent of criticism,¹⁰⁸ yet remained nominally viable authority until finally relegated to dicta status last term in *Rubin*.¹⁰⁹ The inextricably intertwined and concomitant interest language cited above suggests very strongly, however, that a more limited form of the *Posadas* reasoning— the greater power affects the lesser, perhaps— persists as an important justification for treating commercial speech as a second-class citizen of First Amendment doctrine. Yet the Court has never made clear why one government power influences another distinct and fundamentally different power, and to what extent. Until the Court explains

¹⁰⁵478 U.S. 328 (1986).

¹⁰⁶*Id.* at 346.

¹⁰⁷Even the mere phrase the greater power includes the lesser is a dangerous form of legal reasoning because it assumes the very judgment in question. When speaking about a particular good or service, the power to ban it is certainly greater than the power to ban advertising for it. In a more general sense, however, state economic and regulatory authority is simply a different power— not greater and perhaps even lesser— than its very limited power to suppress speech.

¹⁰⁸*See* Brooks R. Fudenberg, Unconstitutional Conditions and Greater Powers: A Separability Approach, 43 U.C.L.A. L. REV. 371, 382 n. 76 (citing numerous law review articles criticizing the *Posadas* decision). *See also*, Donald E. Lively, The Supreme Court and Commercial Speech: New Words with an Old Message, 72 MINN. L. REV. 289, 290-91 (1987) (*Posadas* mocks the constitutional status of commercial speech); Albert P. Mauro, Jr., Comment, Commercial Speech After *Posadas* and *Fox*: A Rational Basis Wolf in Intermediate Sheep's Clothing, 66 TUL. L. REV. 1931, 1968 (1992) (Justice Rehnquist's greater-lesser power argument expressed in *Posadas* negates all protection for commercial speech regarding any activity or product that a state may ban altogether.).

¹⁰⁹*Rubin*, 115 5. Ct. at 1589 n. 2 (reasoning that the greater-lesser power argument was made only after the Court's held that the regulation survived the Central Hudson four-part test).

this justification, a coherent theory and definition of commercial speech will remain elusive.

At this point we know only that commercial speech constitutes a limit on the puremarketplace of ideas theory that justified its protection in the first place.¹¹⁰ Commercial ideas simply have less value than other kinds of ideas—government attempts to suppress them warrant only intermediate scrutiny as a result. Why? The Supreme Court’s reasoning amounts to little more than because we said so, that’s why. Prominent commentators have attacked the notion of protecting different categories of speech according to their putative value as fundamentally at odds with the First Amendment.¹¹¹ For example, Steven Shiffrin writes that the very concept of low-value speech is an embarrassment to first amendment orthodoxy. To say that government cannot suppress speech unless speech is of low-value sounds like a parody of free speech theory. The censor will always be inclined to say that the speech suppressed is of low-value. Thus, the low-value exception mocks the rule. It seems almost like saying that South Africa has a humane racial policy except for its treatment of the blacks.¹¹²

Other scholars rail not just against low-value speech theory generally, but against classifying commercial speech as such. Kozinski and Banner

¹¹⁰Virginia Board, 425 U.S. at 763-65.

¹¹¹See, e.g., Kenneth L. Karst, Equality as a Central Principle in the First Amendment, 43 U. Cm. L. REV. 20 (1975); Thomas Emerson, THE SYSTEM OF FREEDOM OF EXPRESSION 326 (1970). Such critics sometimes cite the Supreme Court’s words back at it, for example:

above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content... To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of the forbidden censorship is content control.

Police Dep’t of City of Chicago v. Mosley, 408 U.S. 92, 95-96 (1951).

¹¹²Steven H. Shiffrin, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE 44 (1990)(footnote omitted).

argue that in a free market economy, the ability to give and receive information about commercial matters may be as important, sometimes more important, than expression of a political, artistic or religious nature.¹¹³ Yet the low-value commercial speech doctrine remains firmly entrenched in First Amendment jurisprudence. The next section demonstrates how the uncertain theoretical basis of the commercial speech doctrine is reflected in the unpredictable doctrinal framework that has emerged since *Virginia Board*.

C. Commercial Speech Doctrine: The Inconsistent Application of Intermediate Scrutiny

1. The *Central Hudson* Test

The commercial speech cases of the late 1970's reflected the Court's uncertainty as to how to proceed in the wake of *Virginia Board*. The Court alternated between balancing the asserted justifications for regulating speech against those for permitting¹¹⁴ and adhering to a non-balancing approach, which was described by the Court in *Linmark Associates, inc. v. Township of Willingboro*:

It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.¹¹⁵

¹¹³Kozinski and Banner, *supra* note 61, at 652. *See also* Aaron Director, The Parity of the Economic Market Place, 7 J.L. & ECON. 1, 6 (1964)([T]he bulk of mankind will for the foreseeable future have to devote a considerable fraction of their active lives to economic activity. For these people freedom of choice as owners of resources in choosing within available and continually changing opportunities, areas of employment, investment, and consumption is fully as important as freedom of discussion and participation in government.)

¹¹⁴*See, e.g.,* Bates v. State Bar of Arizona, 433 U.S. 350 (1977); Friedman v. Rogers, 440 U.S. 1(1979).

¹¹⁵431 U.S. 85, 97 (1977).

In *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm*¹¹⁶ the Court sought to clarify the test by which government regulations of commercial speech should be scrutinized. The Court, purporting to reconcile *Virginia Board* and its progeny, established what has proved to be an enduring four-part test.

In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. [1] For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. [2] Next, we ask whether the asserted government interest is substantial. If both inquiries yield positive answers, we must determine [3] whether the regulation directly advances the governmental interest asserted, and [4] whether it is not more extensive than necessary to serve that interest.¹¹⁷

While the Court has applied the *Central Hudson* test in every commercial speech case since 1980, how strictly the Court construes and applies it in particular cases remains unpredictable.¹¹⁸

2.The Janus Face of Commercial Speech

¹¹⁶447 U.S. 557 (1980).

¹¹⁷*Id.* at 566. In *Florida Bar v. Went For It, Inc.*, the Court reformulated the *Central Hudson* test as a three-pronged inquiry with a threshold requirement that the regulated speech concern lawful activity and not be misleading. 115 S.Ct. 2371. 2375 (1995). For the purposes of this paper, I will continue to refer to the four-part *Central Hudson* test, in keeping with the vast majority of the cases and law review literature to date.

¹¹⁸*See, e.g.*, Valerie D. Wood, Comment, The Precarious Position of Commercial Speech: *Rubin v. Coors Brewing*, 19 HARV. J. L. & PUB. POL'Y 612-13 (1996)(The *Central Hudson* test has proven to be too manipulable to provide any determinate boundaries around when commercial speech can be regulated. Until the Court sheds more light on the meanings of the prongs of the test, the protection of commercial speech will be in doubt in each new case.): P. Cameron DeVore, The Two Faces of Commercial Speech Under the First Amendment, 12-SPG COMM. LAW 1 (1994)(arguing that the 1993 Term once again demonstrated (the Court's) unpredictable approach to First Amendment protection of commercial speech).

The FDA's proposed restrictions on tobacco advertising squarely implicate the unpredictability of the *Central Hudson* test, particularly its third and fourth prongs. As to the first prong, the FDA has not argued to date that tobacco advertising concerns unlawful activity or is misleading, though others have made that argument on its behalf.¹¹⁹ Further, the tobacco and advertising industries concede that the FDA's interest in protecting the public health¹²⁰ is sufficiently substantial¹²¹— they recognize that the Supreme Court has been unequivocal on this point at least.¹²² But whether the regulation directly advances the governmental interest asserted and whether it is not more extensive than necessary to serve that interest have proved to be extremely manipulable standards. Both the FDA and the tobacco lobby can make strong arguments that recent precedent supports their largely irreconcilable interpretations of the *Central Hudson* test. Just last term, in fact, two different but overlapping majorities of justices pronounced two quite different standards for evaluating advertising bans and other commercial speech regulation.¹²³ A discussion of these two standards follows.

a. Central Hudson Part Three

In one line of *post-Central Hudson* commercial speech cases, the

¹¹⁹See, e.g., Allison M. Zieve and Alan B. Morrison, Attorneys for Public Citizen, inc., Comments of Public Citizen, Inc. Regarding the FDA's Proposal to Regulate the Sale and Promotion of Tobacco Products to Minors, 102-107 (1996)(hereinafter Public Citizen).

¹²⁰60 Fed. Reg. at 41,354. Public Citizen argues that such regulations would serve the additional government interests of avoiding the enormous cost of providing health care to future generations of smokers and furthering respect for the law. Public Citizen, *supra* note 118, at 108-109. The FDA would have to make these arguments on its own for a Court to consider them. See *Edenfield v. Fane*, 113 S.Ct. 1792. 1798 (1993)(Unlike rational basis review, the Central Hudson standard does not permit us to supplant the precise interests put forward by the State with other suppositions.).

¹²¹See *infra* part IV.B.2.

¹²²See *Posadas*, 478 U.S. at 341 (holding that the legislature's interest in the health, safety, and welfare of its citizens constitutes a 'substantial' governmental interest); accord *Fox*, 492 U.S. at 475; *Rubin*, 115 S.Ct. at 1591.

¹²³*DeVore*, *supra* note 117, at 1.

Court loosely construes the requirement that the government regulation directly advance its asserted interest. The cases decided right after *Central Hudson* evidence considerable deference to legislative judgments that a particular regulation would in fact accomplish its alleged purpose. For example, in *Metromedia, Inc. v. City of San Diego*,¹²⁴ the Court held that a local ordinance restricting the erection of billboards directly advanced the government's interest in traffic safety. Justice White, writing for a plurality, reasoned that the California Supreme Court agreed with many other courts that a legislative judgment that billboards are traffic hazards is not manifestly unreasonable and should not be set aside. We likewise hesitate to disagree with the accumulated, common-sense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety.¹²⁵

The Court was even more deferential five years later in *Posadas*.¹²⁶ At issue here was a Puerto Rican ban on casino gambling advertising aimed at the island's residents. The state's asserted interest in the ban was to prevent increases in crime, prostitution, and mafia activity, and to avoid disrupting the island's residents' moral and cultural patterns.¹²⁷ The petitioner argued that the ban failed to advance these interests because advertising of other forms of gambling, such as horse racing and the lottery, remained lawful.¹²⁸ In rejecting this argument, the Court appeared to hold the legislature to little more than a good faith standard.

¹²⁴453 U.S. 490 (1981).

¹²⁵*Id.* at 508.

¹²⁶478 U.S. 328 (1986).

¹²⁷*Id.* at 341.

¹²⁸*Id.* at 342.

The Puerto Rico Legislature obviously believed, when it enacted the advertising restrictions at issue here, that advertising of casino gambling aimed at residents of Puerto Rico would serve to increase the demand for the product advertised. We think that the legislature's belief is a reasonable one.... [Further,] the legislature felt that for Puerto Ricans the risks associated with casino gambling were significantly greater than those associated with the more traditional kinds of gambling in Puerto Rico. In our view, the legislature's [determination]..., satisfies the third step of the *Central Hudson* analysis.¹²⁹

As discussed *supra* part III, *Posadas* has been severely criticized and subsequently limited, though this aspect of its holding remains nominally good law.

A recent case indicates the Court's continued, if occasional, willingness to defer to a legislative judgment that a challenged regulation will directly advance the government's asserted interests. In *United States v. Edge Broadcasting Co.*,¹³⁰ the Court upheld a federal statute prohibiting radio broadcast of lottery advertising by licensees located in nonlottery states— a ban enacted to prevent lottery states from interfering with the policy of neighboring nonlottery states. The statute prohibited the respondent— a North Carolina licensee whose listeners were 90 percent Virginians— from broadcasting advertisements for the Virginia lottery.¹³¹ Respondents argued that the regulation, as applied, failed to satisfy *Central Hudson's* third prong because so few of its listeners lived in a nonlottery state. Yet the Court, again per Justice White, rejected the argument

¹²⁹ *Id.* at 341-43.

¹³⁰ 113 S.Ct. 2696 (1993).

¹³¹ *Id.* at 2699.

without any empirical or statistical analysis, and agreed with Congress's commonsense judgment that each North Carolina station would have an audience in that state, even if its signal reached elsewhere and that enforcing the statutory restriction would insulate each station's listeners from lottery ads and hence advance the governmental purpose of supporting North Carolina's laws against gambling.¹³²

The Court did not specify by what standard advancement of the government's ostensible purpose is to be measured.¹³³

Edge Broadcasting notwithstanding, the clear trend of recent cases has been to hold the government to a high burden of proof under *Central Hudson's* third prong.¹³⁴ In *Edenfield v. Fane*—decided two months before *Edge Broadcasting*!—the Court described the test in newly stringent terms, framing the issue as whether the challenged regulation advances these interests in a direct and material way.¹³⁵ The Court explained that: the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose.... This burden is *not satisfied by mere speculation or conjecture*; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that *its restriction will in fact alleviate them to a material degree*.... Without this requirement, a State could with ease restrict commercial speech in the service of other objectives that could

¹³²*Id.* at 2704.

¹³³DeVore, *supra* note 117, at 26.

¹³⁴It is well-settled that the party seeking to uphold a restriction on commercial speech carries the burden of justifying it. *Edenfield v. Fane*, 113 S.Ct. 1792, 1800 (1993)(quoting *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 71 n. 20 (1983)).

¹³⁵113 S.Ct. at 1798. *Edge Broadcasting* did not cite the *Edenfield* refinement of the test.

not by themselves justify a burden on commercial expression.¹³⁶

Applying this language, the Court struck down a Florida ban on in-person solicitation by CPA's. Florida justified the regulation on the grounds that it would advance the state's interests (which the Court held substantial) in preventing fraud and deception, protecting privacy, and maintaining the fact and appearance of independence among CPA's.¹³⁷ The

Court held, however, that the ban failed the third prong of the *Central Hudson* test, based on (1) the state's failure to present any studies or anecdotal evidence, either from Florida or another State that suggest that a ban would prevent these harms; (2) the state's submission of a single affidavit that contained nothing more than a series of conclusory statements; and (3) the existence of contradictory evidence.¹³⁸

Last term, the *Edenfield* refinement of *Central Hudson's* third prong proved the decisive basis on which the Court struck down a longstanding federal law prohibiting beer labels from containing alcohol content information.¹³⁹ In *Rubin v. Coors Brewing Company*,¹⁴⁰ the Court held that this law failed to advance in a direct and material way the government's admittedly substantial interest in curbing strength wars among beer brewers.¹⁴¹ Characterizing the

¹³⁶*Id.* at 1800 (footnotes omitted)(emphasis added).

¹³⁷*Id.* at 1799.

¹³⁸*Id.* at 1800-1801. In striking down the Florida statute, the Court distinguished *Obralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), in which the Court upheld Ohio's ban on in-person solicitation by lawyers. 113 5. Ct. at 1802-1804. The Court based the distinction on alleged differences between the professions. *Id.*

¹³⁹The Court's decision in *Ibanez v. Florida Department of Business and Professional Regulation, Board of Accountancy*, 114 5. Ct. 2084 (1994)(holding that Florida Board of Accountancy's reprimand of petitioner violated her First Amendment rights), cited the *Edenfield* formulation but rested primarily on the determination that the interests asserted by the state were not substantial.

¹⁴⁰115 5. Ct. 1585 (1995).

¹⁴¹115 S.Ct. at 1589-93.

third prong as critical,¹⁴² the Court rejected the government's argument that preventing beer brewers from displaying alcohol strength on beer labels would prevent consumers from choosing beers solely for their alcohol content.¹⁴³ The Court agreed with the District and Appellate Courts' conclusion that the Government had failed to present any credible evidence showing that the disclosure of alcohol content would promote strength wars.¹⁴⁴ The Court also cited the overall irrationality of the Government's regulatory scheme— which permitted beer brewers to continue to advertise alcohol content in the 32 states that do not themselves prohibit such advertising— and dismissed the government's common sense and historical arguments.¹⁴⁵ The Court concluded that

[t]he Government's brief submits anecdotal evidence and educated guesses to suggest that competition on the basis of alcohol content is occurring today and that [the challenged regulation's ban] has constrained strength wars that otherwise would burst out of control. These various tidbits, however, cannot overcome the irrationality of the regulatory scheme and the weight of the record. The Government did not offer any convincing evidence that the labeling ban has inhibited strength wars.¹⁴⁶

Later in the term, the Court held the *Edenfield* formulation of *Central Hudson's* third prong satisfied in *Florida Bar v. Went For It, Inc.*,¹⁴⁷ but the decision reflected no deference whatsoever to the legislative judgment

¹⁴² *Id.* at 1592-93.

¹⁴³ *Id.* at 1590.

¹⁴⁴ *Id.* at 1592.

¹⁴⁵ The government argued that it is assuredly a matter of 'common sense'...that a restriction on the advertising of a product characteristic will decrease the extent to which consumers select a product on the basis of that trait. *Id.* at 1592 (cite to Brief for Petitioner omitted).

¹⁴⁶ *Id.* at 1593.

¹⁴⁷ 115 S.Ct. 2371 (1995).

in question. Rather, after scouring the record, the Court held that a 106 page summary of a 2 year study, containing statistical data and an anecdotal record noteworthy for its breadth and detail, adequately supports the conclusion that the government regulation would advance its asserted justification in a direct and material way.¹⁴⁸

The more recent case law indicates, then, that the FDA will be required to satisfy a high burden of proof in demonstrating that the proposed restrictions would advance its interest in public health in a direct and material way. While the Court might at any time revert to the more deferential approach exemplified by *Metromedia* and *Posadas*, as it did in *Edge Broadcasting*, the FDA must be prepared to meet the standard established in *Edenfield*, *Rubin*, and *Florida Bar*.¹⁴⁹ Under the test as applied in these three cases, the constitutionality of the advertising restrictions and public education campaign will hinge on the FDA's ability to provide ample scientific, statistical, and anecdotal evidence that these measures will reduce youth and adolescent tobacco use—or on the tobacco lobby's ability to provide sufficient evidence to the contrary. These arguments are explored in detail *infra* part IV.B.3.b. b Central Hudson Part Four

On its face, the language of the fourth prong— which asks whether

¹⁴⁸*Id.* at 2377-78.

¹⁴⁹Until last term, the FDA could have argued that regulations of commercial speech concerning socially harmful activities are entitled to even more deference than commercial speech restrictions generally. The argument rested on the Court's considerable deference to the legislative judgments at issue in *Edge Broadcasting* (lottery advertising) and *Posadas* (casino gambling advertising). In *Rubin*, however, the Court explicitly laid to rest the notion of a Central Hudson exception for speech concerning such activities. 115 S.Ct. at 1589 n. 2. Clearly a socially harmful activities exception would have proved extremely useful to the FDA in arguing for the constitutionality of the proposed restrictions at issue here.

the challenged regulation is not more extensive than necessary to serve the government's asserted interest¹⁵⁰— suggests a least restrictive means test.¹⁵¹ Indeed, in *Central Hudson* itself, the Court explained that if a government interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.¹⁵² The Court proceeded to strike down a New York law that ordered electric utilities to cease advertising that promotes the use of electricity as more extensive than necessary to advance the state's interest in energy conservation.¹⁵³ Five years later, in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*,¹⁵⁴ the Court assumed in dicta the validity of the least restrictive means approach.¹⁵⁵

Despite the Court's nominal adherence to the protective *Central Hudson* standard, the cases made clear that the Court favored a more flexible approach.¹⁵⁶ Finally, in *Board of Trustees of the State University of New York v. Fox*,¹⁵⁷ the Court explicitly retreated from the least restrictive means standard and adopted a more lenient test. After summarizing the conflicting tenor of [its] prior dicta, the Court focus[ed] on this specific issue for the first time, and concluded that the subordinate position [of commercial speech] in the scale of

¹⁵⁰See, e.g., *Central Hudson*, 447 U.S. at 566; *Metromedia*, 453 U.S. at 507-508; *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 472 (1988).

¹⁵¹As a doctrinal sidenote, the overbreadth doctrine has no application in the context of commercial speech. *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). In other words, unprotected (i.e. false or misleading) commercial speech does not receive constitutional protection even if efforts to regulate it are overbroad.

¹⁵²447 U.S. at 564.

¹⁵³*Id.* at 569-71.

¹⁵⁴471 U.S. 626 (1985).

¹⁵⁵*Id.* at 651 n.14.

¹⁵⁶See, e.g., *In re R.M.J.*, 455 U.S. 191 (1982) (upholding state rules restricting lawyer advertising); *San Francisco Arts and Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522 (1987) (upholding injunction enjoining use of word Olympic to promote Gay Olympic Games).

¹⁵⁷492 U.S. 469 (1989).

First Amendment values required something short of a least-restrictive means standard.¹⁵⁸ The Court described the appropriate standard as follows:

What our decisions require is a 'fit between the legislature's ends and the means chosen to accomplish those ends,'...- a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served,'..., that employs not necessarily the least restrictive means but... a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to the governmental decisionmakers to judge what manner of regulation may best be employed.¹⁵⁹

The Court did not apply the standard as the case was remanded for further proceedings. The Court did apply the *Fox* refinement of *Central Hudson's* fourth prong in upholding the state regulations challenged last term in *Florida Bar*.¹⁶⁰ At issue in this case were bar rules prohibiting lawyers from using direct mail to solicit personal injury or wrongful death clients within 30 days of accidents.¹⁶¹ The asserted government interest was protecting the privacy and tranquillity of personal injury victims and their loved ones against intrusive, unsolicited contact by lawyers.¹⁶² The Court rejected petitioners' argument that the ban's failure to distinguish between victims in terms of severity of injury or state of mind rendered it insufficiently tailored to the asserted interest, and held the rule reasonably well-tailored to its stated objective of

¹⁵⁸ *Id.* at 477-78.

¹⁵⁹ *Id.* at 480 (footnotes omitted).

¹⁶⁰ 115 S.Ct. 2371 (1995).

¹⁶¹ *Id.* at 2374.

¹⁶² *Id.* at 2376.

eliminating targeted mailings whose type and timing are a source of distress to Floridians, distress that has caused many of them to lose respect for the legal profession.¹⁶³

Florida Bar revives the deferential *Fox* refinement, which appeared to have been limited by the Court's decisions in *City of Cincinnati v. Discovery Network*,¹⁶⁴ and *Rubin v. Coors Brewing Co.*¹⁶⁵ In *Discovery Network*, the challenged ordinance prohibited the distribution of commercial handbills on public property, a ban motivated by [the city's] interest in the safety and attractive appearance of its streets and sidewalks.¹⁶⁶ Because the effect of the law was to require the removal of 62 commercial news racks from public locations, while 1500-2000 noncommercial news racks were permitted to stay, commercial publishers argued that the regulation did not have the requisite fit with the city's interest in reducing visual blight.¹⁶⁷ The Court agreed, holding that the fact that the city failed to address its recently developed concern about news racks by regulating their size, shape, appearance, or number indicates that it has not carefully calculated' the costs and benefits associated with the burden on speech.¹⁶⁸

The Court carefully explained in a footnote that its decision did not mark a return to the least restrictive means test, but if there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech,

¹⁶³ *Id.* at 2380.

¹⁶⁴ 113 S.Ct. 1505 (1993).

¹⁶⁵ 115 S.Ct. 1585 (1995).

¹⁶⁶ *Id.* at 1510.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

that is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable.¹⁶⁹

In *Rubin*, the Court appeared to reinforce *Central Hudson's* fourth prong even further. Having already held that the federal prohibition of alcohol content on beer labeling failed *Central Hudson's* third prong, the Court noted in dicta that the regulation was also insufficiently tailored to its goal. The availability of *several* alternatives to the prohibition¹⁷⁰— not numerous and obvious less-burdensome alternatives— indicates that [the challenged regulation] is more extensive than necessary.¹⁷¹

Thus, the fourth prong of the *Central Hudson* test is even more unpredictable than the third, with no clear trend emerging from even the most recent cases. The Court purports not to adhere to a least restrictive means test, but *Rubin* suggests that the existence of any alternative less burdensome of commercial speech may jeopardize the constitutionality of the challenged regulation. As discussed *infra* part IV.B.4, the tobacco lobby's ability to demonstrate the existence of less burdensome alternatives will determine the fate of the proposed rules under the fourth prong.

IV.THE CONSTITUTIONALITY OF THE FDA'S PROPOSAL

As the foregoing analysis makes clear, the Food and Drug Administration proposes its regulations of tobacco advertising aimed at young people amidst considerable doctrinal inconsistency and theoretical uncertainty in the

¹⁶⁹*Id.* at 1510 n. 13.

¹⁷⁰115 S.Ct. 1585, 1593 (listing available alternatives as directly limiting the alcohol content of beers, prohibiting marketing efforts emphasizing high alcohol strength, or limiting the labeling ban only to malt liquors).

¹⁷¹*Id.* at 1593-94 (emphasis added).

law. Yet the FDA, after taking just three pages of the Federal Register to spell out its legal analysis,¹⁷² concludes with apparent ease that both the advertising restrictions and the education campaign would withstand any First Amendment challenge.¹⁷³ As this part makes clear, the FDA's analysis of the constitutional issues raised by its proposal is far too simplistic. The tobacco lobby can mount an extremely persuasive argument that (1) the public education campaign coerces fully protected speech, and should be struck down under strict scrutiny; (2) the rules that concern only commercial speech nonetheless fail the *Central Hudson* test as it has been defined in recent cases; and (3) irrespective of any doctrine, a coherent theory of the First Amendment holds the regulations unconstitutional. This part addresses these arguments in turn.

A. Does the FDA propose to regulate more than just commercial speech?

The FDA assumes without a word of analysis that the speech it proposes both to restrict and compel is entirely commercial. This assumption is only partly well-founded. The Supreme Court's clear holding that advertising pure and simple is commercial speech¹⁷⁴ forecloses an argument that the proposed restrictions of outdoor advertising and advertising in publications without a primarily adult readership should not be subjected to intermediate scrutiny.¹⁷⁵ Indeed, such advertising is at the core of commercial speech as

¹⁷²FDA Proposal, 60 Fed. Reg. at 41,353-355.

¹⁷³Id at 41,354

¹⁷⁴Zauderer, 471 U.S. at 636.

¹⁷⁵See also *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1980)(subjecting restrictions of billboard advertising to Central Hudson test); *Penn Advertising of Baltimore, Inc. v. Mayor and City Council of Baltimore*, 63 F.3d 1318, 1325-26 (4th Cir. 1995), *petition for cert. filed*. 64 U.S.L.W. 3399 (U.S. Nov. 22, 1995)(No. 95-806)(applying Central Hudson test

identified in *Discovery Network*.¹⁷⁶

A slightly closer question might be presented by the proposed prohibitions of (1) selling or otherwise distributing promotional items bearing the name, selling message, or logo of a tobacco product, and (2) sponsoring any athletic, musical, artistic, or other event that involves the use of the corporation, or a brand name, selling message, logo, or other indicia of product identification. These forms of commercial expression are designed to promote what advertising mogul Leo Burnett once described as friendly familiarity,¹⁷⁷ or brand awareness. While they do not propose a specific transaction, as does most core commercial speech, such promotional activities build a growing familiarity with a product name and trademark and confidence in it.¹⁷⁸ Increased familiarity results in increased market share, and thus an increased number of commercial transactions.

There is little constitutionally significant distinction between advertising and these forms of promotional expression. Indeed, the reason for putting a brand logo on a hat or a car or a concert t-shirt is to create moving (and often human) billboards for particular products.¹⁷⁹ As Public Citizen argues, the FDA took pains to limit the reach of its proposed rules to those activities

to local ordinance restricting outdoor advertising of cigarettes).

¹⁷⁶113 S.Ct. 1505, 1513 (1993).

¹⁷⁷*Id.* Burnett, *supra* note 33, at 5.

¹⁷⁸*Id.*

¹⁷⁹*See* Public Citizen, *supra* note 118, at 92 (The courts have made clear that the 'commercial speech' doctrine applies to speech well beyond that which merely proposes a sale. Rather, as the Court emphasized in *Bolger*, any speech that links a product with a selling message constitutes commercial speech... Thus, for instance, placing a Marlboro logo on a T-shirt is an expressive act within commercial speech doctrine, since the point of doing so is to convert the T-shirt into a walking billboard that conveys a selling message specific to an individual product— i.e., buy and smoke Marlboro cigarettes.).

undertaken by tobacco companies and their advertisers to promote the sale of tobacco products.¹⁸⁰ Under *Bolger v. Youngs Drug Products, Inc.*—where the expression’s reference to a specific product name and economic motivation were two factors that supported the Court’s conclusion that the suppressed speech was commercial—these forms of expression are clearly commercial.¹⁸¹ The expansive definition of commercial speech offered in *Central Hudson*,¹⁸² and the Court’s decision in *Discovery Network* to subject a regulation of non-core commercial speech to the *Central Hudson* test,¹⁸³ clearly suggest that the definition of commercial speech is not narrow and formalistic.

The tobacco lobby might respond that, because categorizing expression as lowvalue speech renders it more easily suppressed, the dangers of censorship mandate that a court act cautiously at the margins of the category. This caution requires a court to note that a third factor was at work in *Bolger*, the *Central Hudson* definition has never been followed, and the speech at issue in *Discovery Network* bears no resemblance to these expressive promotional activities. The argument that such promotional expression is not commercial speech breaks down, however, upon trying to explain what else it is. Attempts to paint such expression as examples of self-realization or political speech would be unconvincing for obvious reasons.¹⁸⁴ In addition, no Supreme Court case

¹⁸⁰ *Id.*

¹⁸¹ 463 U.S. 60, 66-67 (1983).

¹⁸² 447 U.S. 557, 561 (1980) (defining commercial speech as expression related solely to the economic interests of the speaker and its audience).

¹⁸³ *Discovery Network*, 113 5. Ct. at 1514.

¹⁸⁴ As discussed *supra* part III.B., corporate speech is inconsistent with the notions of individual liberty and self-fulfillment that are the basis of the self-realization theory of the First Amendment. Thus, the argument that such speech is expressive is runs into trouble upon trying to discern who doing the expressing. Leo Burnett, *supra* note 33, at 42-44 argues that the restrictions impermissibly limit] the creative range of individual expression by preventing

supports the literalist notion that only speech that does no more than propose a commercial transaction counts as commercial speech for the purposes of the First Amendment. In the final analysis, no basis exists for treating these forms of promotional expression as anything but commercial speech.¹⁸⁵

The same may not be said, however, of the FDA's proposed public education campaign. As noted *supra* part II.B., proposed section 897.29 would require each manufacturer to establish and maintain [at a cost of \$150 million per year] a national public educational program, including major reliance on television messages, to combat the effects of pervasive and positive imagery that has for decades helped to foster a youth market for tobacco products.¹⁸⁶ It is well-settled, of course, that rules that coerce speech may violate the First Amendment just as easily as laws that suppress it.¹⁸⁷ Unless the expression compelled is deemed commercial, such a regulation is unconstitutional unless it is the least restrictive means of achieving a compelling government interest.¹⁸⁸ Much rides, then, on the FDA's ability to characterize the speech as commercial.

The proposed public education campaign appears to coerce fully

people from wearing hats or shirts with the logo of their choice. Though creative, the argument is not on point— the case would be a different one if the expression at issue were that of private citizens and not intended to propose commercial transactions.

¹⁸⁵See also David A. Locke, Note, Counterspeech As An Alternative to Prohibition: Proposed Federal Regulation of Tobacco Promotion in American Motorsport, 70 ND. L. J. 217, 239 (1994) (arguing that a challenge to proposal would implicate the commercial speech doctrine).

¹⁸⁶FDA Proposal, 60 Fed. Reg. at 41,326.

¹⁸⁷See, e.g., *Wooley v. Maynard*, 430 U.S. 705 (1977) ([T]he right to freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all). This right extends to corporations. See *Turner Broadcasting Co. v. FCC*, 114 S.Ct. 2445, 2458 (1994); *Pacific Gas and Elec. Co. v. Public Util. Comm'n*, 475 U.S. 1, 16 (1986) (For corporations as for individuals, the choice to speak includes within it the choice of what not to say.).

¹⁸⁸*Riley v. National Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 800 (1988).

protected–not commercial’–speech.¹⁸⁹ P. Cameron DeVore and Burt Neuborne, two of the nation’s foremost authorities on commercial speech jurisprudence, vigorously argue this point on behalf of the Association of National Advertisers.

This education program... compels manufacturers to engage in fully protected–not commercial–speech by financing and disseminating the government’s viewpoint on issues of public importance.... The messages the FDA proposes to require manufacturers to disseminate do not contain commercial speech. Although the manufacturers would be required to pay to produce and broadcast these messages, none of the messages proposes a commercial transaction or clarifies the terms or conditions of a commercial transaction. Rather, these messages would contain speech on addiction, the health risks associated with beginning to smoke at a young age, and dealing with social influences experienced by young people.¹⁹⁰

In a similar vein, former Judge Robert Bork, writing for the Washington Legal Foundation and an informal coalition of race car drivers, argues that [t]his speech... would not be ‘commercial’ under any accepted definition of the term. Rather, the content of these messages are to be educational in nature.

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While the outer margins of the commercial speech category are uncertain, the FDA¹s proposal contradicts even the vague contours that emerge

¹⁸⁹Association of National Advertisers, Inc., Submission of the Association of National Advertisers, Inc. in Connection with Proposed Regulations Restricting Advertising of Cigarettes and Smokeless Tobacco Products, Docket No. 95N-0253, 51(1995) (hereinafter ANA).

¹⁹⁰*Id.* at 52-53.

¹⁹¹Robert H. Bork and Daniel J. Popeo, Comments of the Washington Legal Foundation, Mario Andretti, Tony Bettenhausen, Don Garlits, Al Unser, Rusty Wallace, and Cale Yarborough, Docket No. 95N-0253, p. 36 (December 28, 1995)(hereinafter Bork).

from dicta. In *Virginia Board*, for example, the Court noted that the speech whose content deprives it of protection cannot simply be *speech on a commercial subject*. No one would contend that [a] pharmacist may be prevented from being heard on the subject of whether, in general, pharmaceutical prices should be regulated, or their advertisement forbidden.¹⁹² Likewise here, the FDA would coerce the tobacco industry into speaking about whether, in general, kids should smoke. That money is spent to project the expression does not cause it to lose First Amendment protection.¹⁹³

While the FDA asserts that the education campaign would be consistent with disclosure and corrective advertising requirements upheld in commercial contexts, even Public Citizen— which defends the constitutionality of every other aspect of the proposed rule and applauds the FDA’s goal of establishing a comprehensive public education campaign— concedes that existing case law does not support such an ambitious program.¹⁹⁴ First, the FDA begs the definitional question by citing cases where the compelled speech was clearly commercial.¹⁹⁵ Second, a crucial distinction between the FDA’s proposal and other constitutionally permissible rules compelling speech is that the FDA proposes to require speech entirely distinct from any speech initiated by product manufacturers concerning the sale of tobacco products.¹⁹⁶ For example, in *Za-*

¹⁹²452 U.S. at 761-62 (emphasis added).

¹⁹³*Buckley v. Valeo*, 424 U.S. 1, 35-59 (1976).

¹⁹⁴Public Citizen, *supra* note 118, at 141-46.

¹⁹⁵The FDA cites *Virginia Board*, 425 U.S. at 771 n. 24 (They may also make it appropriate to require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive.) and *In re R.M.J.*, 455 U.S. 191, 201 (1982)(warning or disclaimer might be appropriately required... in order to dissipate the possibility of consumer confusion or deception). FDA Proposal, 60 Fed. Reg. at 41,355.

¹⁹⁶ANA, *supra* note 188, at 53.

uderer v. Office of Disciplinary Counsel of Supreme Court of Ohio,¹⁹⁷ the Court upheld a state bar rule requiring attorneys who advertise their willingness to work on a contingent fee basis to disclose that clients may have to bear litigation expenses even if they lose. The Court reasoned that the state had attempted merely to require that appellant include *in his advertising* purely factual and uncontroversial information about the terms under which his services will be available.¹⁹⁸ Compare the messages compelled by the FDA's educational campaign, which would not be uncontroversial, would have no direct bearing on the terms of a particular transaction, and would appear entirely separate from tobacco advertising—indeed, the program would be partly on television and radio, where tobacco advertising is prohibited!¹⁹⁹

Once it becomes apparent that the FDA's proposed education campaign would compel fully protected speech, its unconstitutionality is clear in light of *Pacific Gas & Electric Co. v. Public Utilities Commission of California*,²⁰⁰ where the Court struck down a far less drastic attempt to compel non-commercial speech about a commercial subject. At issue in this case was a state requirement that public utilities provide ratepayer advocacy groups access to utility newsletters included with customer bills.²⁰¹ The Court reasoned that, because the newsletter and the envelope itself belonged to the utility, the agency impermissibly compelled the utility to engage in fully protected speech by requiring it to use *its* property as a vehicle for spreading a message with

¹⁹⁷471 U.S. 626 (1985).

¹⁹⁸ *Id.* at 651 (emphasis added).

¹⁹⁹ ANA, *supra* note 188, at 53.

²⁰⁰475 U.S. 1(1986).

²⁰¹ *Id.*

which it disagrees.²⁰² In the present case, not only would the tobacco industry disagree with much of what the FDA would compel it to say, but the FDA would choose the messages that would run directly counter to the industry's financial interests.²⁰³ That the messages may contain statements of fact does not render the proposal any more constitutional, as the Court has clearly held.²⁰⁴ Once again, even Public Citizen concedes that the theory that it is constitutionally permissible to compel a company to fund a message that it finds abhorrent as a condition of allowing the company to engage in other commercial, expressive activities is unlikely to prevail.²⁰⁵

Thus, the public education campaign fails even to get to first base, and only the FDA's proposed restrictions of advertising and promotional activities move on to be subjected to the *Central Hudson* test.

B. The FDA Proposal and the Two Faces of *Central Hudson*

The FDA argues that its proposed restrictions of tobacco advertising are designed to reduce the appeal of tobacco products to young people.²⁰⁶ Because advertising and promotional activities can influence a young person's decision to smoke or use smokeless tobacco products, the FDA contends that reducing their appeal will reduce the number of young people influenced by

²⁰²*Id.* at 17 (emphasis in original).

²⁰³*See also* Miami Herald Publishing v. Tornillo, 418 U.S. 241, 258 (1974) (holding unconstitutional a Florida law requiring newspapers who criticize a political candidate's character or record to print a reply of equal prominence and space).

²⁰⁴*See, e.g.,* Ibanez v. Florida Department of Business and Professional Regulation, 114 S.Ct. 2084 (1994) (striking down state law requiring a Certified Financial Planner to include in advertisements the truthful statement that CFP designation was granted by organization not affiliated with the government); Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781 (1988) (striking down state requirement that professional fundraisers disclose the percentage of funds they paid to charities).

²⁰⁵Public Citizen, *supra* note 118, at 143.

²⁰⁶FDA Proposal, 60 Fed. Reg. at 41,354.

them.²⁰⁷ As this section demonstrates, whether these conclusions are true as empirical or scientific matters is uncertain. The critical legal question is whether the proposed restrictions are nonetheless constitutional in spite of this uncertainty. In its legal analysis, the FDA relies exclusively on the line of cases most deferential to legislative judgments and, therefore, most permissive of government regulations of commercial speech. Not surprisingly, the FDA concludes the *Central Hudson* test easily satisfied. This section attempts a more complete analysis, taking account of the competing strain of the case law, drawing conclusions far more hesitantly as to the constitutionality of the scheme.

1. Is tobacco advertising misleading' or does it concern unlawful activity?

As noted *supra* part III.C.2., the FDA does not argue that tobacco advertising falls outside the scope of the First Amendment's protection altogether on the grounds that it concerns unlawful activity or is misleading. One might have expected the FDA to make either argument, or both, as Public Citizen urges in its comment.²⁰⁸ The FDA presents evidence elsewhere in its proposal that much of the promotional efforts of the tobacco industry are geared toward an illegal end— inducing minors to try and break the law by obtaining cigarettes and smokeless tobacco products that may not legally be sold or otherwise provided to them.²⁰⁹ For example, the FDA describes industry

²⁰⁷Id. at 41,315.

²⁰⁸Public Citizen, *supra* note 118, at 96-107.

²⁰⁹*Id. at* 98. Indeed, when President Clinton was asked at the news conference announcing the rules if they violated the First Amendment, it was on this basis that he defended them. It is illegal for children to smoke cigarettes. How then can it be legal for people to advertise to children to get them to smoke cigarettes? MacNeil/Lehrer NewsHour, August 10, 1995.

documents that it claims suggest not only that tobacco manufacturers know that their advertising campaigns induce minors to smoke, but that certain campaigns (like the one featuring the notorious Joe Camel) were initiated precisely for this purpose.²¹⁰ Further, the FDA's intent generally is to restrict the ubiquitous images and messages [that] convey to young people that tobacco use is desirable, socially acceptable, safe, healthy, and prevalent in society²¹¹— images and messages that the FDA believes to be deceptive.

The FDA's decision not to adopt this line of argument may be represent a strategic decision to stake out a moderate position in the hopes that the industry would more readily accept it.²¹² If so, the Liggett Group's recent settlement suggests that the strategy may be paying off. The decision might rest on other considerations, however, such as the substantial difficulty and cost involved in attempting to prove such claims; the body of lower court case law treating similar types of advertising as concerning lawful activity and not deceptive²¹³; avoiding jurisdictional overlap with and intrusion on the Federal Trade Commission. Whatever its reasons, because the FDA has not drafted its proposal (nor has the lobby drafted its comments) with these arguments in mind, a full analysis of these issues at this point is premature and thus beyond the scope of this paper.

2, Is the FDA's asserted interest substantial?

²¹⁰FDA Proposal, 60 Fed. Reg. at 41,330-331

²¹¹*Id* at 41,314.

²¹²The decision may be an example of the real administrative law that we discussed so often in class.

²¹³*See, e.g.,* Penn Advertising, 63 F.3d 1318; Anheuser-Busch, 63 F.3d 1305; Dunagin v. City of Oxford Mississippi, 718 F.2d 738 (5th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984)(upholding state law prohibiting liquor advertising).

The FDA asserts that its interest in proposing these restrictions is to promote public health by reducing the death and disease caused by tobacco products.²¹⁴ As noted *supra* part III.C.2., the Supreme Court has held an asserted interest in the public health sufficiently substantial in several cases,²¹⁵ and would surely do so here. While conceding that the FDA's articulated interest in protecting minors from physical harm clearly is substantial, the tobacco lobby argues that this is hardly an interest directly served by the regulations.²¹⁶ Instead, the industry argues that the only aim these regulations can be said to serve in any *direct* way is that of helping to delegitimize smoking... to acculturate citizens to abandon the notion that smoking is socially acceptable and to embrace the ideals of a smoke-free society.²¹⁷ The goal of this paternalistic campaign, the industry concludes, cannot even be deemed a legitimate, let alone substantial interest.²¹⁸

This argument misunderstands the second prong of the *Central Hudson* test. The argument that the restrictions do not directly advance the asserted interest bears on the third element of the test. Further, the *Central Hudson* test does not appear to contemplate an inquiry into the government's

²¹⁴Id.

²¹⁵See *supra* note 121. See also *Penn Advertising of Baltimore, Inc. v. Mayor and City Council of Baltimore*, 63 F.3d 1318, 1325 (4th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3399 (U.S. Nov. 22, 1995)(No. 95-806)(there can be little opposition to the assertion that the City's objective in reducing cigarette consumption by minors constitutes a substantial public interest).

²¹⁶Comments of Brown & Williamson Tobacco Corporation, Liggett Group Inc., Lorillard Tobacco Company, Phillip Morris Incorporated, R.J. Reynolds Tobacco Company, and Tobacco Institute Inc. Before the United States Food and Drug, Volume IX, Docket Nos. 95N-0253 and -02531, 23-24(1995)(hereinafter Tobacco Industry).

²¹⁷*Id.* at 24 (emphasis in original).

²¹⁸*Id.* See also, ANA, *supra* note 188, at 16 (much could be said about whether the Executive branch's and the FDA's interest is, in fact, the concededly substantial one of protecting the health of minors now and in the future).

real motive for enacting a rule. The second prong asks merely whether the *asserted* government interest is substantial.²¹⁹ The tobacco lobby cites, and further research reveals, no commercial speech cases invalidating state action on the grounds that the government's asserted interest was not, in fact, the actual motivation behind the law.

3. Do the FDA restrictions directly advance its asserted interest?

a. Conflicting Standards

The FDA's ability to satisfy *Central Hudson's* critical third prong hinges first on how its burden of proof is defined. Predictably, the FDA argues that it should be held to the extremely deferential *Central Hudson* third prong standard articulated in *Edge Broadcasting*, *Posadas*, and *Metromedia*.²²⁰ The FDA defines for itself the lowest possible burden:

The Supreme Court has stated that, when determining whether an action advances the governmental interest, it is willing to defer to the 'common-sense judgments' of the regulatory agency as long as they are not unreasonable. *Metromedia*, 453 U.S. at 509 (We likewise hesitate to disagree with the accumulated, common-sense judgments of local lawmakers...).²²¹

At first glance, making this claim without so much as a *cf* of the competing standard defined in *Edenfield* and *Rubin* smacks of wishful thinking.²²² Yet a pair of recent Fourth Circuit decisions bolsters the agency's con-

²¹⁹ *Central Hudson*, 447 U.S. at 566 (emphasis added).

²²⁰ See *supra* part III.C.2.a.

²²¹ FDA Proposal, 60 Fed. Reg. at 41,354.

²²² Indeed, some aspects of its reasoning are clearly so. For example, the FDA wholly disregards the footnote in *Rubin* that expressly disavows both (1) a lower level of protection for speech that advertises socially harmful activities and (2) the greater-lesser power reasoning of *Posadas*. See *Rubin*, 115 S.Ct. at 1589 n.2. Undaunted, the FDA makes these arguments

tention that this, indeed, is the applicable rule.

In *Anheuser-Busch, Inc. v. Schmoke*, the court rejected a First Amendment challenge to a Baltimore ordinance prohibiting outdoor advertising of alcoholic beverages in publicly visible locations, including outdoor billboards, sides of buildings, and free standing signboards.²²³ Citing the same trilogy of cases—*Metromedia*, *Posadas*, and *Edge Broadcasting*—the court defined the test as follows:

There is a *logical nexus* between the City's objective and it means it selected for achieving that objective, and it is not necessary, in satisfying Central Hudson's third prong, to prove conclusively that the correlation in fact exists, or that the steps undertaken will solve the problem.... The proper standard for approval must involve an assessment of the *reasonableness of the legislature's belief* that the means it selected will advance its ends.²²⁴

The legislative finding that the majority of research studies show a definite correlation between alcoholic beverage advertising and underage drinking, while recognizing that not all studies reached the same conclusion satisfied the City's burden under this test. Like the FDA's proposal, the court made no attempt to reconcile these cases with *Edenfield* and *Rubin*. The Fourth Circuit reached the identical conclusion, applying the exact same test, to the companion case involving cigarette advertising. In *Penn Advertising of Baltimore, Inc. v. Mayor and City Council of Baltimore*,²²⁵ the Court held that a similar prohibi-

anyway at 60 Fed. Reg. 41,355.

²²³63 F.3d 1305, 1308 (4th Cir. 1995), *pen non for cert. filed*, 64 U.S.L.W. 3333 (U.S. Oct. 27, 1995)(No. 95-685).

²²⁴*Id.* at 13 14-15 (emphasis added).

²²⁵63 F.3d 1318 (4th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3399 (U.S. Nov. 22,

tion of outdoor cigarette advertising in publicly visible locations did not violate the First Amendment. Reasoning that the City could satisfy its burden by pointing to legislative facts, studies, history, or common sense, the court merely quoted the *Anheuser-Busch* passage excerpted above, and held the test satisfied based on evidence gathered during public hearings of the city council.²²⁶

The FDA's apparent assurance that its restrictions will pass constitutional muster is well-placed if the Fourth Circuit cases indicate the scrutiny to which they will be subjected. Surely the evidence the FDA presents in support of its restrictions— which is discussed more fully *infra* — satisfies the meager standard of review defined in *Metromedia* and applied by the Fourth Circuit. If the tobacco lobby is to prevail, it must change the terms of the debate.

The tobacco lobby responds that the First Amendment protection of commercial speech is far more substantial than FDA has recognized and accuses the FDA of fall[ing] far short of acknowledging the Supreme Court's most recent description of the commercial speech doctrine in *Rubin*.²²⁷ The review actually applied, it argues, though somewhat less exacting than strict scrutiny..., is nonetheless demanding... [and] the government's power to suppress commercial speech is severely circumscribed.²²⁸ As to the third prong, the tobacco interests argue that the FDA's burden *affirmatively* to demonstrate the

1995)(No. 95-806).

²²⁶*id.* at 1323, 1325. *Cf.* *Sterling Doubleday Enterprises, L.P. v. City of New York*, No. 6855/94, slip op. (N.Y. Sup. Queens Cty. Dec. 8, 1994) (denying a preliminary injunction that would have directed the removal a Marlboro billboard facing the center field playing area in New York's Shea Stadium). Noting that concern for children may not be permitted to cloud the dispositive factual and constitutional issues, the Court held that the city failed to establish that the particular sign in issue is 'aimed' at children, or has in the past, or will in the future, induce children to smoke cigarettes. Slip op. at 2.

²²⁷Tobacco Industry, *supra* note 215, at 19.

²²⁸*Id.* at 21.

direct advancement of its goals has repeatedly and ever more forcefully been emphasized by the Supreme Court in recent years.²²⁹ Thus, the ANA cites as the applicable test the *Edenfield* formulation of the standard as it was described in *Rubin*:

[T]he Government carries the burden of showing that the challenged regulation advances the Government's interest 'in a direct and material way.' That burden is not satisfied by mere conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.²³⁰

Such an unequivocal statement in a 1995 Supreme Court decision would foreclose this dispute in most contexts, but the Fourth Circuit cases illustrate the continuing unpredictability of the commercial speech doctrine. While the FDA's restrictions satisfy the low burden of proof it has selectively defined for itself, the *Rubin* reformulation poses a much stiffer test. A court adhering to *Rubin* would look much more critically at the evidence that is summarized in the next section.

b. Conflicting Evidence

A comprehensive review of the extensive literature concerning the strength of the connection between advertising and tobacco use by minors is beyond the scope of this paper. Even a brief summary, however, suffices to illustrate that the jury is still out on this question.

The FDA argues that tobacco advertising plays an important role

²²⁹ *Id.* at 24 (emphasis in original).

²³⁰ ANA, *supra* note 188, at 17 (citations omitted).

in a youth's decision to use tobacco.²³¹ Tobacco companies use images that appeal specifically to young people, such as the rugged and masculine Marlboro Man and the cool Joe Camel, thereby linking smoking to success, social acceptance, sophistication and a desirable lifestyle.²³² In short, tobacco advertising capitalizes on typical teen notions of insecurity and invulnerability and convinces them that smoking will create for them the desired self-image and the ability to communicate that image to others, all without the risk of any harm.²³³

In support of its theory, the FDA offers evidence—gathered primarily from 1994 reports of the Surgeon General²³⁴ and Institute of Medicine²³⁵—sufficient to conclude that advertising and labeling play a significant and important contributory role in a young person's decision to use cigarettes or smokeless tobacco products.²³⁶ The FDA claims that the first and most compelling piece of evidence supporting restrictions on cigarette and smokeless tobacco product... advertising and promotion is that these products are among the most heavily advertised products in America.²³⁷ The FDA then describes three categories of

²³¹FDA Proposal, 60 Fed. Reg. at 41,329.

²³²President Clinton himself claimed that Joe Camel tells young children that smoking is cool. TeenAgers and Tobacco, NEW YORK TIMES, Aug. 11, 1995, at A18. The FDA argues that tobacco industry documents reveal that cigarette manufacturers have conducted extensive research on smoking behavior and attitudes in young people and how advertisements should be made to appeal to young people. FDA Proposal, 60 Fed. Reg. at 41,329. Indeed, such a strategy is necessary, according to the FDA, to the economic health of the industry as a whole and individual firms in particular. For example, the FDA proposal cites a document acquired from the Canadian sister company of Brown & Williamson that reads: If the last ten years has taught us anything, it is that the industry is dominated by the companies who respond most effectively to the needs of younger smokers. *Id.* at 41,331.

²³³FDA Proposal, 60 Fed. Reg. at 41,329. Moreover, even campaigns not so blatantly directed at juveniles,..., using more universal themes can be as effective with young people. *Id.* at 41,330.

²³⁴1994 SGR, *supra* note 10.

²³⁵IOM, *supra* note 10.

²³⁶FDA Proposal, 60 Fed. Reg. at 41,332 (emphasis added).

²³⁷*Id.* at 41,329. The FDA claims that the tobacco industry spent \$6.2 billion in 1993 on the

additional evidence: (1) studies demonstrating that young people are aware of, respond favorably to, and are influenced by cigarette advertising,²³⁸; (2) studies of selective advertising campaigns that were effective with children,²³⁹; (3) direct quantitative studies showing the relationship between advertising and tobacco use and of the effects of advertising restrictions and bans on consumption.

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The FDA concludes on the basis of this evidence that the preponderance of quantitative and qualitative studies of cigarette advertising suggests: (1) A causal relationship between advertising and youth smoking behavior, and (2) a positive effect of stringent advertising measures on smoking rates and on youth smoking... Finally, examples of specific campaigns directed at young people support the hypothesis that cigarette advertising and promotion play an important role in encouraging young people to start smoking, to sustain their smoking habit, and to increase consumption.²⁴¹

advertising, promotion, and marketing of cigarettes and smokeless tobacco. *Id.* at 41,315.

²³⁸*Id.* at 41,332-333. For example, the FDA cites a recent Gallup survey that found that 87 percent of adolescents surveyed could recall seeing one or more tobacco advertisements and that half could identify the brand name associated with one of four popular cigarette slogans, *Id.* at 41,332; a survey that found a positive relationship between smoking level and cigarette advertisement recognition, *Id.*; a study of 640 Glasgow children that concludes that cigarette advertising has predisposing, as well as reinforcing, effects on children's attitudes towards smoking and their smoking intentions. *Id.*

²³⁹*Id.* at 41,333. The FDA cites numerous studies of the notorious Joe Camel ad campaign, including a report that found that teenagers were twice as likely as adults to identify Camel cigarettes as one of the two most advertised brands. *id.* A study funded by R.J. Reynolds that found that 72 percent of 6 year olds and 52 percent of children between the ages of 3 and 6 could identify Joe Camel. These rates exceeded recognition rates for Ronald McDonald, a remarkable statistic given that Ronald McDonald appears on television during children's viewing hours and cigarette advertising may not appear on T.V. *Id.* The FDA also cites data collected in 1990 by California researchers finding that Camel experienced a 230 percent increase in its under 18 market share from (pre-Joe Camel) 1986 to 1990. *Id.*

²⁴⁰*Id.* at 41,333-334. The FDA cites studies of the experience of other nations showing a positive relationship between advertising restrictions or bans and reductions in smoking rates among young people.

²⁴¹*Id.* at 41,334.

The tobacco lobby has a three-fold response to the FDA's evidence. First, it alleges that the FDA misunderstands the purpose and effect of its advertising. Leo Burnett maintains that the purpose of tobacco advertising is to maintain brand loyalty and encourage brand switching among adults who choose to smoke, and argues strenuously that its advertising in no way targets minors, though it is often geared towards the young adult smoker.²⁴² The reason why tobacco products are so heavily advertised is that the tobacco industry is well-recognized as one of the most fiercely competitive market categories.²⁴³

Second, the tobacco lobby maintains that the FDA's data simply does not establish a *causal* connection between tobacco advertising and a minor's decision to begin smoking.²⁴⁴ It argues that the very language the FDA uses in describing its conclusions—hypothesis, Important contributory role, evidence suggests—is an acknowledgment that no causal link has been proven. Further, the industry notes that even the FDA concedes that '[m]any behavioral and personal characteristics influence an adolescent's decision to use cigarettes or smokeless tobacco products' and that advertising and promotional activities at most, merely 'contribute to the multiple and convergent psychological influences

²⁴²Leo Burnett, *supra* note 33, at 4, 27.

²⁴³*Id.* at 6. Leo Burnett even makes the clever, if unsubstantiated, claim that restricting tobacco advertising will do nothing more than make a tobacco product a 'forbidden fruit,' thereby rendering it more attractive to rebellious-minded teenagers. *Id.* at II.

²⁴⁴Leo Burnett argues that advertising theory explains the lack of causation. Leo Burnett explains restricting or banning advertising will not affect the incidence of children smoking because '[i]t's not a [s]et of brand names that cause trial and usage of products in a mature market, which Leo Burnett claims the tobacco market to be. *Id.* at 10-11. The decision to make a category purchase within a mature product category is ALREADY made before advertising affects the brand choice within the category. *Id.* at 6. A mature market is one that ceases to evolve very much—the market stage where advertising functions to merely shift customers from one brand to another, but does not act as a stimulus to new customers to enter the market. *Id.* at 12 (footnote omitted). See also ANA, *supra* note 188, at 29 (The FDA Misunderstands the Role and Function of Advertising in a Mature Market.)

that lead children and youths to begin using these products.’²⁴⁵ As Dr. J.J. Boddewyn argues, the studies favorably cited [by the FDA] are really about *associations* between cigarette advertising and smoking behavior rather than about causality.²⁴⁶ Noting the similar conclusions of official investigations conducted in this country and around the world,²⁴⁷ Dr. Boddewyn contends that the evidence simply does not demonstrate a causal connection between tobacco advertising the prevalence of youth smoking. Particularly damning to the FDA is the conclusion of a 1989 report compiled by then-Surgeon General Koop:

[t]here is no scientifically rigorous study available to the public, that provides a definitive answer to the basic question of whether advertising and promotion increase the level of tobacco consumption... The extent of the influence of advertising and promotion is unknown and possibly unknowable.²⁴⁸

²⁴⁵Tobacco Industry, *supra* note 215, at 26-27 (quoting FDA Proposal, 60 Fed. Reg. at 41,329-30). The lobby argues that the decision to begin smoking is influenced by numerous factors, but predominantly by family and friends. Bork, *supra* note 190, at 5. See also Leo Burnett, *supra* note 33, at 35.

²⁴⁶J. J. Boddewyn, Ph.D. Preface to ‘Cigarette Advertising Bans and Smoking: The Flawed Policy Connection,’ *INTERNATIONAL JOURNAL OF ADVERTISING*, 1994, 13(4), 311-332, 3 (emphasis in original) (hereinafter Boddewyn); see also Bork, *supra* note 190, at 18 (FDA has confused correlation with causality).

²⁴⁷Boddewyn stresses two recently completed official investigations in particular. A 1990 Report of the Standing Committee on Legislation of the Western Australian Parliament concluded that

[a]fter receiving evidence from people eminent in relevant fields of research, the Committee is forced to the conclusion that no compelling evidence has been presented that advertising causes people, and in particular young people, to begin smoking. The strongest case presented to the Committee suggests that a mix of personal and social factors acting together causes young people to experiment with smoking. Among young people at risk, advertising might well be influential in their decision, particularly regarding the brands they choose. However, advertising in isolation from all other factors shaping young people’s lives has not been shown to be a primary cause in their decision to begin smoking.

Id. at 2. Boddewyn also cites the 1995 Supreme Court of Canada decision invalidating Canada’s ban on cigarette advertising, which held that [a]t this point, [there is not] a clearly understood causal connection between advertising, or any other environmental factor, and tobacco consumption. *Id.* (citing 1995 SCJ No. 68, 21 September 1995. p. 54).

²⁴⁸Dept. Health and Human Services. Reducing the Health Consequences of Smoking: 25 Years of Progress: A Report of the Surgeon General. Office of Smoking and Health 512

Even more persuasive are the results of the Federal Trade Commission's comprehensive three-year investigation of the Joe Camel campaign, which concluded [a]fter considering every possible avenue to a lawsuit to ban the ads that although it may seem intuitive to some that the Joe Camel advertising campaign would lead more children to smoke or lead children to smoke more, the evidence to support that intuition is not there.²⁴⁹ The tobacco industry argues that the FTC's conclusion, reached only after

'spend[ing] a great deal of time and effort reviewing the difficult factual and legal questions raised by t[he] case, including a comprehensive review of the relevant studies and statistics,'²⁵⁰ should carry a great deal of weight.

Finally, the tobacco lobby challenges the FDA's conclusion that advertising restrictions would reduce to a material degree the incidence of tobacco use by minors.²⁵¹ The industry points to the experience of countries where cigarette advertising has been either severely restricted or totally banned. In Finland and Norway, for example, where ads have been banned since 1978 and 1975 respectively, smoking rates have remained largely unchanged from the pre-ban period.²⁵² In Australia and Sweden, countries with more recent bans,

(1989)(cited at Boddewyn, *supra* note 245, at 2). The tobacco industry argues that the studies relied upon by the FDA itself fail to conclude the existence of a causal relationship. Tobacco Industry, *supra* note 215, at 30 and n.29.

²⁴⁹R.J. Reynolds Tobacco Co., FTC Release (statement of Commissioners Azcuenaga, Owen and Starek), *reprinted in* Tobacco Industry, *supra* note 215, at 27-28 (If intuition and concern for children's health were a sufficient basis under the law for bringing a case, we have no doubt that a unanimous Commission would have taken that action long ago... Indeed, our concern about the health of children led us to consider every possible avenue to a lawsuit before reaching today's conclusion.).

²⁵⁰*Id.*

²⁵¹*See, e.g.,* Tobacco Industry, *supra* now 215, at 33-34; ANA, *supra* note 188, at 28-29; Boddewyn, *supra* note 245, at 8-9;

²⁵²Boddewyn, *supra* note 245, at 10-11; ANA, *supra* note 188, at 29.

smoking rates have actually risen in the past few years.²⁵³ c.Does *Rubin* mean what it says?

The evidence presented by the tobacco lobby thus casts severe doubt on the constitutionality of the proposal. The FDA can argue that its proposed regulations are supported by far more evidence than the restrictions overturned in *Edenfield*²⁵⁴ and *Rubin*.²⁵⁵ Indeed, the FDA's supporting data may most resemble the evidentiary record in *Florida Bar*, where the Court held a 106 page summary of a 2 year study, containing statistical data and an anecdotal record noteworthy for its breadth and detail sufficient to meet the government's burden under *Central Hudson's* third-prong.²⁵⁶ Yet the tobacco lobby can distinguish *Florida Bar* on the critical grounds that the supporting data at issue there was at no time refuted, which is hardly true in the present case.²⁵⁷ The industry's primary argument, however, should be that if the Court's language in *Rubin* means what it says— a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction *will in fact alleviate them to a material degree*— the FDA's proposal does not satisfy *Central Hudson's* third prong.

This argument is persuasive. The FDA convincingly establishes

²⁵³Boddewyn, *supra* note 245, at 10.

²⁵⁴113 5. Ct. 1792, 1800 (1993) (holding that government presented no studies or anecdotal evidence that suggest that the restricted expression createld] the dangers intended to be alleviated).

²⁵⁵115 5. Ct. 1585, 1593 (1995)(holding that government submitted anecdotal evidence and educated guesses but failed to present any credible evidence that the restricted expression caused the harms complained ot).

²⁵⁶115 5. Ct. 2371, 2377-78 (1995). The *Florida Bar* majority noted that it did not read our case law to require that empirical data come to us accompanied by a surfeit of background information. *Id.* at 2378.

²⁵⁷*Id.*

some link— be it a correlation or causation or association— between tobacco advertising and tobacco use by minors. The argument that such advertising *causes* kids to begin using tobacco products is severely undercut, however, by (1) the conclusions of the Surgeon General, the FTC, and several official investigations conducted abroad and, to a lesser extent, (2) by the language the FDA uses to describe the very studies it relies on. Further, the experiences of other countries that have enacted similar restrictions or all-out bans sharply contradict FDA’s argument that its proposed restrictions will effectively reduce tobacco use to a material degree.

Thus, the FDA’s best chance is to hope that the Fourth Circuit is right in believing that the Court did not mean what it said in *Rubin*. The FDA can cling to its deferential strain of case law in the hopes that no court would really require it to prove what, at this moment, cannot be proven. Based on the history of the commercial speech doctrine, the FDA cannot be blamed for trying.

4. Is the FDA proposal sufficiently narrowly tailored?

Once again, inconsistent Supreme Court precedent creates uncertainty as to the appropriate test under this *Central Hudson* prong. FDA argues for the *Fox* restatement of the rule:

What our decisions require is a ‘fit between the legislature’s ends and the means chosen to accomplish those ends,’...- a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is ‘in proportion to the interest served,’..., that

employs not necessarily the least restrictive means but... a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to the governmental decisionmakers to judge what manner of regulation may best be employed.²⁵⁸

As with the third prong, the FDA argues, the Supreme Court has expressed a willingness to defer this determination to the regulating body.²⁵⁹ Here again, the Fourth Circuit cases demonstrate the continuing vitality of the deferential strain of the case law. The circuit court applied the following standard to the restrictions on alcohol and tobacco outdoor advertising at issue in *Penn Advertising* and *Anheuser-Busch*:

If there were some less restrictive means of screening outdoor advertising from minors, or of reducing the area of billboard regulation in a manner that would have it focus more effectively on reaching minors, the City would have to consider those alternatives. But it is not an acceptable response to the approach taken by the City of limiting advertising exposure to say that the City must abandon altogether an approach that directly advances its goal. In the face of a problem as significant as that which the City seeks to address, the City must be given some reasonable latitude.²⁶⁰

Needless to say, the Court held that the City acted within its reasonable latitude to do so. The FDA should have little difficulty satisfying the *Fox* formulation of *Central*

Hudson's fourth prong, though not on the grounds actually argued

²⁵⁸FDA Proposal, 60 Fed. Reg. at 41,355 (citing *Fox*, 492 U.S. at 480).

²⁵⁹*Id.* (citing *Edge Broadcasting* and numerous lower court decisions).

²⁶⁰*Anheuser-Busch*, 63 F.3d at 1314; *Penn Advertising*, 63 F.3d at 1325-26.

in the proposal.²⁶¹ The

FDA's fourth-prong analysis relies heavily on the discredited greater power includes the lesser reasoning of *Posadas*.²⁶² The agency argues, for example, that because it could have banned the sale or distribution of the product, or banned certain of the marketing and promotional practices of the tobacco industry, the lesser steps of regulating... advertising., are reasonable.²⁶³ As discussed *supra* part III.B.2.b., this reasoning should not be sufficient to satisfy the government's burden on this point.

Nonetheless, the fit between the FDA's chosen means and its asserted ends should satisfy the deferential *Fox* standard. The FDA's proposal represents a deliberate effort to prevent allegedly harmful advertising from reaching children, while attempting not to suppress advertising that is either harmless or is viewed primarily by adults.²⁶⁴ The tombstone ad regulation, though possibly imperfect by the FDA's own admission,²⁶⁵ would reduce the attraction and appeal of tobacco advertising for minors while still providing useful information to consumers legally able to purchase these products.²⁶⁶ The proposed ban on outdoor advertising within 1000 feet of schools or playgrounds singles out those places where children and adolescents spend a great

²⁶¹See FDA Proposal, 60 Fed. Reg. at 41,355.

²⁶²See *supra* part III.B.2.b.

²⁶³FDA Proposal, 60 Fed. Reg. at 41,355.

²⁶⁴The FDA argues that because the evidence would support a complete prohibition of tobacco advertising, the limited restrictions proposed should be upheld. *Id.* A court seems unlikely to give much weight to this bit of circular reasoning, and would probably simply evaluate whether the evidence supports the regulations actually proposed.

²⁶⁵See FDA Proposal, 60 Fed. Reg. at 41,335 (Recognizing that it is difficult to draw the line between advertising that should be restricted or regulated and advertising that does not pose an unreasonable risk of influencing young people, the agency requests comment on the appropriateness of the proposed regulations and whether other alternatives would be more appropriate or effective.)

²⁶⁶*Id.*

deal of time, and is merely an expansion of the 500 foot limit that is already part of the tobacco industry's voluntary Cigarette Advertising and Promotion Code.²⁶⁷ The complete prohibition of all promotional non-tobacco items and brand sponsorship of events is clearly the least tailored of the proposed advertising restrictions. Because the FDA made no effort to distinguish those items and events that appeal to minors from those that do not, this restriction may be vulnerable to attack even under the *Fox* standard. Still, Public Citizen argues that FDA's line-drawing, at least as to the event sponsorship provision, is eminently reasonable... [in that it] allow[s] tobacco companies to continue to sponsor events and therefore reap the corporate good will that flows from sponsorship, but compels the companies to jettison the hard-sell message that now typifies these events.²⁶⁸ In the end, however, a court that chooses to apply the more deferential standard has probably already decided to uphold the restriction at issue, unless it is substantially excessive or disregards 'far less restrictive and more precise means.'²⁶⁹ A court would almost certainly refuse to so hold as to any of the proposed restrictions.

The tobacco lobby contends, however, that FDA is seriously confused over its fourth prong responsibilities,²⁷⁰ and argues for the more speech-protective application of *Central Hudson's* final prong. The industry maintains that a government restriction of commercial speech must be narrowly tailored

²⁶⁷ *Id.* at 41,334-335. The FDA can also point to *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981), as an example of the Court's deference to billboard regulations.

²⁶⁸ Public Citizen, *supra* note 118, at 133.

²⁶⁹ *Fox*, 492 U.S. at 479 (citation omitted). Florida Bar is also persuasive authority for the proposition that a concededly over-inclusive restriction of commercial speech may still satisfy the fourth prong, though the regulation at issue there was only temporary. 115 S. Ct. at 2380.

²⁷⁰ ANA, *supra* note 188, at 21.

and its costs carefully calculated to accomplish its asserted purpose.²⁷¹ Citing *Discovety Network* and *Rubin*, the industry asserts that [r]egulations which disregard far less restrictive means and more precise means of achieving the government's asserted objectives are not narrowly tailored.²⁷² The tobacco lobby alleges that FDA fails to satisfy its fourth prong burdens because (1) alternative approaches would accomplish the FDA's asserted interests far more effectively without burdening any speech, and (2) its regulations sweep far too broadly, restricting expression to adults in the name of protecting children.

The tobacco lobby argues vigorously that two obvious alternatives would entail no restriction of speech whatsoever. First, the federal government should simply intensify law enforcement efforts, either by enacting federal laws prohibiting the sale and distribution of tobacco products to minors or merely supporting state efforts that do the same. Through better enforcement of current laws and stiffer penalties for offenders, child access laws can have a significant direct impact without burdening speech at all.²⁷³ FDA itself is fully aware that [y]outh access restrictions have been found to be effective in reducing illegal sales and... that efforts to reduce access have led to a decrease in tobacco use by young people.²⁷⁴ In fact, Subpart B of the FDA proposal includes measures intended to toughen law enforcement efforts across the country.

A second obvious alternative is for FDA to step up its own edu-

²⁷¹Tobacco Industry, *supra* note 215, at 34.

²⁷²*Id.*

²⁷³*Id.* at 35.

²⁷⁴FDA Proposal, 60 Fed. Reg. at 41,322. Evidence suggests that state laws prohibiting sales to minors are not vigorously enforced. One study cited by the ANA, *supra* note 188, at 47, reports that 67 percent of minors with an average age of 15 were asked no questions when they attempted to purchase cigarettes.

cation efforts— to use counter-speech to combat the tobacco industry’s speech. Here again FDA acknowledges the efficacy of such public education campaigns by proposing to require the industry to establish and fund one. While this proposal is almost certainly unconstitutional, as demonstrated *supra* part IV.A., nothing prevents the government from designing and funding one of its own. In fact, the ANA notes that Congress has already directed the Secretary of Health and Human Services.., to ‘establish and carry out a program to inform the public of any danger to human health’ presented by the use of cigarettes or smokeless tobacco products. ²⁷⁵

The tobacco lobby argues further that the proposed restrictions are not sufficiently tailored to their purported goal of protecting minors. The industry charges FDA with violating the principle enunciated by the Supreme Court in *Butler v. Michigan* precluding governments from reduc[ing] the adult population... to reading only what is fit for children. ²⁷⁶ In a methodical rule-by-rule analysis, the industry demonstrates how each proposed regulation would effectively bar cigarette advertising directed at adults. ²⁷⁷

Tombstone Ads. First, this proposed restriction would amount to a total ban on tobacco advertising in the affected publications because the limited value of this advertising means it would make no sense to place the ads at all.²⁷⁸

Second, as Robert Bork argues, the FDA provides no basis for having chosen the

²⁷⁵ANA, *supra* note 188, at 49 (citing 15 U.S.C. sections 1341, ~01).

²⁷⁶352 U.S. 380, 383 (1957); *see also* Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 74 (The level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox.).

²⁷⁷Tobacco Industry, *supra* note 215, at 5.

²⁷⁸*Id.*

85 percent figure.²⁷⁹ A rule that restricts advertising in a newspaper whose readership includes only 16 percent minors, or a national news magazine read by 50 million people, two million one of whom happen to be under the age of eighteen, is clearly anything but narrowly tailored. Moreover, those publications that approach the two million or fifteen percent thresholds, but do not always cross them, would present constant difficulties for publishers and manufacturers alike, who often enter into multi-issue agreements and rely on the ability to plan ahead.²⁸⁰ These implications raise the suspicion that [the FDA] is using minors as a pretext to try to ban cigarette advertising generally.²⁸¹

Outdoor Advertising. The tobacco industry argues that the regulation prohibiting all outdoor advertising within 1000 feet of any playground or school is equally and unnecessarily draconian. According to the industry's comments to the FDA, such restrictions would ban outdoor advertising in 94.8 percent of Manhattan (88.4 percent if the regulation applied to schools only), 90 percent of Boston (82 percent if applied to schools only), and 87.7 percent of Seattle (under a broad definition of 'playground').²⁸²

Promotional Items and Sponsorship. Robert Bork argues convincingly that the broad scope of these restrictions violate *Central Hudson's* fourth prong.

Even if there was compelling evidence that sponsorship of certain events or of certain merchandise increased underage smoking, the FDA has not

²⁷⁹Bork, *supra* note 190, at 24.

²⁸⁰ANA, *supra* note 188, at 44.

²⁸¹Bork, *supra* note 190, at 24.

²⁸²Tobacco Industry, *supra* note 215, at 6-7. This data is presumably based on its own computations as no source for these figures is cited.

tailored its ban to those events or to those items that would have any particular appeal to children. Instead, brand-name tobacco sponsorship identification is banned at all events and for all merchandise, regardless of their appeal to children.

The scope of events regulated by FDA could not be broader. They include any athletic, musical, artistic or other social or cultural event.’ Such a broad ban suggests that children may be a pretext for bans on brand name sponsorship identification for these events across the board rather than a justification for a regulation narrowly designed to protect children.²⁸³

Prohibiting brand sponsorship in auto racing, for example, where the FDA’s own stats suggest that children constitute a mere seven percent of the viewing audience,²⁸⁴ is to burn the house to roast the pig.²⁸⁵

Thus, under the more speech-protective interpretation of *Central Hudson’s* fourth prong, the FDA’s failure to tailor its restrictions more narrowly, combined with the existence of two alternatives that burden no speech whatsoever, may render the proposal unconstitutional. One can argue that the FDA calculated the costs of its restrictions as inadequately as the government did in *Discovery Network*, where the Court struck down a local ordinance banning all commercial newsracks on public property without regard to

size, shape, appearance, or number in the interest of preventing visual blight.²⁸⁶ Clearly the FDA could have proposed less burdensome re-

²⁸³Bork, *supra* note 190, at 19-20.

²⁸⁴Bork, *supra* note 190, at 20 (citing FDA Proposal, 60 Fed. Reg. at 41,337).

²⁸⁵*Id.* (citing *Butler v. Michigan*, 352 U.S. 380, 383 (1957)).

²⁸⁶113 S. Ct. at 1510.

strictions by distinguishing between events and items that appeal to children and those that do not; by taking account not just of the distance between outdoor advertising and playgrounds but also of the direction from which the advertising can actually be seen; by raising the 15 percent threshold and eliminating it altogether for publications with smaller circulation. Further, the mere availability of two non-speech burdening alternatives could in and of itself render the plan unconstitutional, depending on how seriously one construes the Court's dictum in *Rubin* that the availability of several alternatives indicates that [the challenged regulation] is more extensive than necessary.²⁸⁷

The FDA can respond that trying to protect children by restricting advertising intended for both children and adults will necessarily involve some imprecise line-drawing. No one approach can be perfect and, no matter what the FDA proposes, inevitably the industry will quibble over the manner in which the FDA drew the line.²⁸⁸ Because this argument invariably leads to asking for some degree of latitude, the FDA must argue that even the more restrictive approach does not foreclose giving it any.

5. The Limits of the *Central Hudson* Test

The application of the *Central Hudson* four prong test to the FDA proposal is profoundly unsatisfying. First, the unpredictability of the commercial speech doctrine renders a clear legal analysis virtually impossible. This frustrates students of the First Amendment, but must downright infuriate legislators, manufacturers and advertisers who are left in the dark as to what

²⁸⁷115 5. Ct. at 1593 (listing three alternatives to the government's proposed scheme).

²⁸⁸Public Citizen, *supra* note 118, at 126.

regulation is constitutionally permissible and what is not. A second source of the discontent engendered by the *Central Hudson* analysis is the theoretical uncertainty that underlies it. Contrasting rhetoric in the case law—compare, for example, commercial speech occupies a subordinate position in the scale of First Amendment values with the free flow of commercial information is indispensable to the proper allocation of resources in a free enterprise system—leaves one with little sense as to what the First Amendment *should* permit. If the First Amendment protects the marketplace of ideas, why should commercial ideas be more easily suppressed than other kinds? Should only certain kinds of commercial ideas receive less protection than others?

The next section explores the theoretical arguments for and against the FDA's proposed restrictions of tobacco advertising. In the face of doctrinal uncertainty, an analysis of the First Amendment concerns at stake sheds light on the appropriate constitutional status of these rules.

C. The FDA Proposal and First Amendment Theory

As argued *supra* part III.B.2.b., the commercial/non-commercial speech distinction is largely unprincipled. The asserted commonsense differences that explain why commercial speech receives a lesser degree of protection collapse under analysis. The leveling and greater power affects the lesser justifications, though never fully articulated by the Court, seem equally without basis in First Amendment theory. While the FDA can make two additional arguments that its proposed restrictions are consistent with First Amendment values, neither is persuasive. The First Amendment mandates that the government not

pick and choose which expression gets to compete in the marketplace of ideas without a sufficient showing that the expression actually causes harm. The government must not be permitted to restrict commercial speech more easily simply because it deems the manner in which the speech proposes a transaction insufficiently informative or the transaction itself harmful.²⁸⁹

Let us assume for present purposes what is an accurate description of reality anyway, namely, that tobacco products pose undeniably grave risks to our health and well-being, and that, though the evidence suggests some correlation between advertising and the decision to begin using such products, no causal link has been proven.

1. The FDA proposal restricts images, not information.

The proposed restrictions of tobacco advertising focus on image rather than information. Requiring tombstone ads in those publications not primarily read by adults, for example, prohibits R.J. Reynolds from using the Joe Camel character allegedly so popular with children, but still permits it to advertise the tar and nicotine content of its Camel cigarettes. Similarly, banning brand sponsorship in auto racing, to take another example, has nothing to do with suppressing information that might help consumers make *rational* decisions about how to spend their money. Indeed, the very idea of such a ban is to prohibit the *emotional* appeal of fast cars and rugged race car drivers. As a

²⁸⁹ See Kozinski and Banner, *supra* note 1, at 752 (If all it takes to remove First Amendment protection from a given kind of speech is that a sufficiently large number of people finds the speech less valuable than other kinds, we may as well not have a First Amendment at all. Such an understanding of the First Amendment—according to which speech not valued by a majority receives no protection—throws all speech regulation questions back into the political arena.)

Phillip Morris executive explained,

'We perceive Formula One and Indy Car racing as adding, if you will, a modern-day dimension to the Marlboro Man. The image of Marlboro is very rugged, individual, heroic. And so is this style of auto racing. From an image standpoint, the fit is good.'²⁹⁰

The Court, however, justifies its protection of commercial expression primarily by reference to its informational value, the strong individual and societal interests in free flow of commercial information.²⁹¹ The seminal *Virginia Board* case, for example, concerned drug price advertising that the Court described as communicating the simple idea of I will sell you the X prescription drug at the Y price. Subsequent cases have largely concerned the suppression of expression that communicates some useful information, such as beer alcohol content labeling,²⁹² attorney solicitation,²⁹³ and contraceptive pamphlets.²⁹⁴ As Professors Collins and Skover note, the 'information function is central to the Court's approval of commercial expression as a form of protected speech. Indeed, of the major commercial speech cases in which governmental regulation has been invalidated, nearly all 'involved restrictions on purely or predominantly informational speech, such as the bans on price advertising.' By comparison, governmental regulations were sustained in cases not involving predominantly 'informational advertising.'²⁹⁵

²⁹⁰FDA Proposal, 60 Fed. Reg. at 41,337 (footnote omitted).

²⁹¹425 U.S. at 763-64; *see also supra* part III.B.2.a.

²⁹²Rubin 115 5. Ct. 1585.

²⁹³*See, e.g.*, Bates, 433 U.S. 350; Ibanez, 114 5. Ct. 2084.

²⁹⁴Bolger, 463 U.S. 60.

²⁹⁵Ronald K.L. Collins and David M. Skover, Commerce and Communication, 71 Tnx. L. REv. 697, 730 (1993)(footnotes omitted).

Thus, the FDA can argue that its restrictions have little to do with why the First Amendment protects commercial expression in the first place. Eliminating Joe Camel and the Marlboro Man from the marketplace of ideas will have no detrimental impact on consumers ability to make informed economic decisions. In fact, such restrictions are designed precisely to encourage minors to make rational decisions about whether or not to begin smoking— and the FDA surely believes that is what the industry fears most.

Professor Collins and Skover agree with the FDA. They characterize much of today's commercial speech as having less to do with products than lifestyles, less to do with facts than image, and less to do with reason than romance. ²⁹⁶ Collins and Skover quote advertising executives who describe their trade as concerning not 'products but a person and his life,' concentrating 'on the perceptions of the prospect.... [and n]ot the reality of the product.' ²⁹⁷

Insofar as advertising succeeds, the identity of the consumer is continually reshaped by a relationship to goods and services... 'We differentiate ourselves from other people by what we buy... In this process we become identified with the product that differentiates us.'... Advertising displays the kinds of cars we should own, the kinds of clothes we should wear, the kinds of alcohol and soda we should drink, the kinds of perfumes and colognes we should use—in short, the kinds of people we should be.²⁹⁸

Collins and Skover argue that such speech in the service of selling is not entitled to the same degree of First Amendment protection as what they

²⁹⁶ *Id.* at 708.

²⁹⁷ *Id.* at 706 (footnotes omitted).

²⁹⁸ *Id.* at 716 (footnotes omitted).

call the (purely information based) classified model of advertising. Not only is such speech valueless, they contend, but it actually debases the traditional First Amendment values of rational decisionmaking and self-realization by transforming the marketplace of ideas into a marketplace of commercial symbols.²⁹⁹

Though Collins and Skover rightly argue that the commercial speech doctrine does not account for the reality of modern advertising, this is no reason to abandon First Amendment protection of such advertising altogether. Image-based advertising does not express the type of idea described in *Virginia Board*, but it expresses ideas nonetheless, indeed the very ideas described by Collins and Skover in their critique. The notion that smoking will make you cool or sexy, however frivolous and mundane in the FDA's eyes, should be subjected to the rigors of the marketplace of ideas like any other. That the government disagrees with or disapproves of this idea— to the extent that it is actually able to identify and articulate the idea that a particular image or slogan communicates— is also no justification at all to suppress it. In fact, it is precisely the judgment that the First Amendment prohibits governments from acting on.

The Court's holding in *R.A. V. v. St. Paul*³⁰⁰ is instructive on this point. In *R.A. V.*, the Court struck down an ordinance prohibiting otherwise unprotected hate speech on the grounds that the law suppressed hate speech that espoused a particular point of view. The case has come to stand for the proposition that even when the government is regulating a class of speech that normally receives little or no First Amendment protection, the First Amend-

²⁹⁹*id.* at 698, 745 (Justice Blackmun and his allies have ignored the dissonance between today's commercial expression and the noble purposes of the First Amendment.)

³⁰⁰112 5. Ct. 2538 (1992).

ment's strict neutrality standards, which render presumptively unconstitutional discrimination based on content or viewpoint, still apply with full force.³⁰¹

Just because the First Amendment requires the government not to restrict expression that seeks to influence people's views of what is cool does not mean that it may not try to do some influencing of its own.³⁰² The neutrality principle only extends as far as make no law abridging. Nothing in the First Amendment prohibits government-sponsored counterspeech, and, of course, governments endorse and advocate official viewpoints on public health issues, tobacco use included, all the time. In the Conclusion, I argue for the approach that the First Amendment always counsels—more speech.

2.Smoking is a harmful activity.

The FDA believes that tobacco advertising causes kids to begin smoking. The FDA argues that studies that reveal a strong association but fail to prove causation should nonetheless provide sufficient support for its proposed restrictions because the FDA should have broad latitude to regulate advertising for socially harmful activities. This argument is invalid as a doctrinal matter after *Rubin*, as we have seen, but does it carry more weight as a theoretical justification?

This argument begins with the premise that the First Amendment is not an absolute. The government may restrict speech that causes sufficiently serious harm, as do libel and fighting words, so long as it can satisfy the high

³⁰¹Rodney A. Smolla, Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech, 71 TEX. L. REV. 777, 788 (1993)(describing the Supreme Court's holding in *R.A.V.*).

³⁰²See *generally* *Rust v. Sullivan*, 500 U.S. 173 (1991)(upholding DHHS regulations which limit the ability of Title X fund recipients to engage in abortion-related activities).

burden of proving that the suppressed speech does in fact cause the harm complained of. Speech that promotes illegality may be restricted, for example, only if it is directed to inciting or producing imminent lawless action and... is likely to incite or produce such action.³⁰³ Thus, the constitutionality of the FDA's proposal would be entirely justifiable as a theoretical matter if the evidence as to causation were unequivocal. The FDA's argument here is that, because kids should not be smoking in the first place, the FDA should be held to a lower burden of proof as to causation and the somewhat ambiguous evidence should be sufficient.

The two dangers of this socially harmful activity argument are its circularity and its serious potential for abuse. Allowing governments greater latitude to regulate speech that concerns harmful activities simply encourages would-be regulators to classify more activities as harmful. Thus, deferring to restrictions of tobacco advertising because smoking is bad for you opens the door for similar regulations of advertising for alcohol, coffee, beef, and countless other products that are not good for us.³⁰⁴ This rationale would most endanger unpopular industries that opportunistic governments might target for political gain—indeed, some argue that this is the precise motivation of the regulations at issue here.³⁰⁵ But those inclined to support the tobacco restrictions simply because they loathe the tobacco industry must consider the implications of

³⁰³*Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

³⁰⁴Leo Burnett, *supra* note 33, at 26, points to the example of Australia, where a government official reassured advertisers that its newly enacted ban on tobacco advertising did not mean that it would be 'alcohol and chocolates tomorrow.' One year after the tobacco ban became law, the movement against alcohol advertising began. *id.* (footnote omitted).

³⁰⁵*See* comments of Thomas Lauria, assistant to the president of the Tobacco Institute, *reprinted in* Bureau of National Affairs Health Care Daily, Oct. 19, 1995.

this First Amendment be damned approach. Many supporters of this proposal would be most unhappy to find, for example, the same rationale adopted by conservative governments to restrict contraceptive advertising on the grounds that it causes people to engage in premarital sex.³⁰⁶

Thus, the argument that the degree of First Amendment protection of speech that proposes a commercial transaction should correspond to the value of that transaction to society undermines fundamental free speech principles. Those sympathetic to the FDA's goals must not allow their opinions of the tobacco industry or smoking generally to cloud their judgment.

V.CONCLUSION

A thorough analysis of the First Amendment issues raised by the FDA's proposed advertising restrictions reveals serious constitutional defects. The public education campaign is a clearly impermissible attempt to compel fully protected speech. And though inconsistent and unpredictable case law precludes a clear assessment of the constitutionality of the remaining restrictions, a coherent theory of the First Amendment requires these rules to be struck down as well.

Assuming the FDA does not lack the jurisdiction, it is not powerless against the positive imagery that makes [tobacco products] so appealing to children and adolescents.³⁰⁷ As the saying goes, the best defense is a good

³⁰⁶In *Carey v. Population Services International*, 431 U.S. 677 (1977), the Court held unconstitutional a New York statute that prohibited the advertising and display of contraceptives, a statute enacted, in part, because such advertising allegedly legitimized illicit sexual behavior in the eyes of minors. The Court held that the speech in question failed the *Brandenburg* test described *supra* pages 67-68. *Id.* at 701. A government seeking to enact a similar prohibition could point out that *Brandenburg* was decided before *Central Hudson*, the test that would be applied today and, if the FDA's reasoning is accepted, might permit such a ban.

³⁰⁷FDA Proposal, 60 Fed. Reg. at 41,314.

offense. If it is image, emotion, and appeals to the young's sense of live for the moment that work with today's youth, than the FDA must use these tools to its advantage. The FDA's public education campaign should stress not grim facts and figures, however sobering these might be, but images depicting smoking and cigarette use as uncool. How about a camel with a hacking cough? A race car that sputters after just a few laps? A young boy unable to get a prom date because he smokes or uses smokeless tobacco?

The First Amendment mandates that the government have extremely limited power to suppress speech because people can best decide for themselves what is a good idea and what is not. If the FDA is so firmly convinced that kids should not smoke, the burden is on it, and on all of us who agree, to figure out ways to persuade others that we are right.